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No. 00-

IN THE

Supreme Court of the United States

BETTY JEAN GURLEY,

Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state may define a debtor's "equitable interest[]" in property to include property fraudulently transferred which renders that property part of the bankruptcy estate "as of the commencement of the case" under federal bankruptcy law, 11 U.S.C. § 541(a)(1), and thereby deprives the debtor of the statute of limitations governing actions to void fraudulent transfers.

PARTIES TO THE PROCEEDING

There are no parties other than the ones named in the caption. There were no other parties in the proceedings below, but the United States of America and William M. Gurley were plaintiff and defendant, respectively, in a separate but related adversarial case in the bankruptcy court proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Betty Jean Gurley ("Betty Gurley") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) was entered on September 20, 2000, and is not reported. The order denying the petition for rehearing and rehearing *en banc* (App. 43a-44a) was entered on November 7, 2000, and is not reported. The order of the United States District Court for the Middle District of Florida (App. 4a-11a) was entered on August 9, 1999, and is not reported. The Memorandum Opinion and Judgment of the United States Bankruptcy Court for the Middle District of Florida (App. 15a-42a) were entered on August 15, 1997, and an Amended Judgment of

that court (App. 12a-14a) was entered on September 16, 1997; neither is reported.

JURISDICTION

The opinion and final judgment of the court of appeals were entered on September 20, 2000. The court of appeals denied Betty Gurley's petition for rehearing and suggestion for rehearing en banc on November 7, 2000. On January 23, 2001, Betty Gurley filed a timely application for extension of time to file the petition for certiorari in this case; Justice Kennedy granted the application and allowed petitioner until March 7, 2001, to file the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 541 and 544, are reprinted in App. 45a-50a.

STATEMENT OF THE CASE

1. On November 18, 1987, the United States brought a civil action against William Gurley and others, including his wife of 40 years, Betty Gurley, under the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") for environmental contamination at a site located in Edmonson, Arkansas. App. 17a. Betty Gurley was dismissed as a defendant in June 1990. *Id.*

As the Bankruptcy Court found, *prior to Betty Gurley's June 1990 dismissal from the CERCLA action* and after experiencing health problems, William Gurley transferred to his wife (a) assets valued at approximately $17 million, including real property conveyed by properly recorded deeds, and (b) a deed of gift of personal property related to the

Moltan Company. App. 17a-20a.[1] William Gurley testified that he had done so for "estate planning" purposes. *Id.* at 24a. The court, however, found that William Gurley somehow knew 18 months in advance that Betty Gurley would be dimissed from the CERCLA action and that two years hence judgment would be entered against him such that he "retained complete control of the property transferred after the transfers occurred" and "received no consideration." *Id.* Accordingly, the court concluded that his intent in making the transfers was "to hinder, delay and defraud the United States." *Id.* Finally, William Gurley also transferred substantial additional assets to Betty Gurley after April 25, 1990. *Id.* at 20a-22a.[2]

At the end of the Edmonson site trial, on September 13, 1990, the United States' attorney, Craig Johnson, "raised concerns regarding the sale and rumored transfers from [William Gurley] to his wife, Mrs. Gurley." App. 20a. Although "[t]he District Court instructed Mr. Johnson to file a

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[1] In 1989, when the transfers at issue commenced, Betty Gurley personally held between $7 and $8 million in her own assets. App. 5a. Indeed, the lower courts simply ignored that Betty Gurley had purchased a Florida condominium with her own funds and ordered this property, which had never been transferred to her, to be transferred back to the bankruptcy estate. *Id.* at 14a. The courts also failed to address that virtually all of the real estate transferred had been held by the Gurleys as tenants by the entirety, so that William Gurley transferred to Betty Gurley only his right of survivorship in most of the real property at issue. *See, e.g., id.* at 19a-20a. Finally, the courts have not acknowledged that William Gurley lost any right to sign checks or withdraw funds from accounts transferred to Betty Gurley in 1989. In their eagerness to add to the bankruptcy estate, the lower courts ignored both the applicable statute of limitations, see *infra*, and Betty Gurley's substantial real and personal property rights.

[2] Betty Gurley does not challenge the lower courts' decision that transfers to her after April 25, 1990 may be avoided, because those transfers fall within the six-year limitations period applicable to the trustee's action seeking to avoid William Gurley's fraudulent transfers. This petition addresses only the voiding of the transfers made prior to April 25, 1990.

Motion and Affidavit in support of the allegations that there were conveyances of property which needed to be set aside," it refused to permit discovery and Mr. Johnson did not file a Motion or Affidavit. *Id.* The court entered judgment in favor of the United States on March 26, 1992, holding defendants including the Debtor jointly and severally liable in the amount of $1,786,502.95, and for future costs incurred. *Id.*

Thereafter, the United States sent letters to the Debtor to discover his personal financial information but "did not (1) take depositions in aid of execution, (2) obtain an issuance of a writ of execution, (3) review public property records, (4) review corporate records, or (5) issue subpoenas for banks and other record keepers." App. 21a. As the Bankruptcy Court ultimately found, "[t]he United States failed to exercise reasonable due diligence in discovering the transfers to Mrs. Gurley." *Id.*

2. William Gurley ("the Debtor") filed a voluntary chapter 7 petition under the United States Bankruptcy Code on July 26, 1995. See 11 U.S.C. § 101 *et seq.* On April 26, 1996, the Trustee in bankruptcy commenced an Adversary Proceeding, seeking to recover certain allegedly fraudulent conveyances under the Florida Uniform Fraudulent Transfer Act ("FUFTA"), the Federal Debt Collection Procedures Act ("FDCPA"), and the Bankruptcy Code, 11 U.S.C. § 544(b).

In ruling in that proceeding, the Bankruptcy Court observed that a trustee in bankruptcy "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . . ." *Id.* The trustee has only the rights of the creditor; thus, if the creditor's claim is time barred, so, too, is the claim of the trustee. App. 29a-30a. And, the court further recognized that under Florida law, the prohibition of fraudulent transfers has a limitations period of four years, and that the FDCPA authorizes the United States to avoid fraudulent transfers made in the *six* years prior to the filing of the claim. *Id.* at 30a-33a. Accordingly, the trustee, acting on behalf of the

United States, was entitled to avoid any fraudulent transfers made on or after April 25, 1990. See *id.* at 33a (the trustee's claim was "timely only against property fraudulently transferred on or after April 25, 1990, six years before the adversary proceeding was filed in 1996"). As set forth *supra* at n.2, petitioner does not challenge this decision.

But the Bankruptcy Court also included within the Debtor's estate both (a) the assets transferred prior to April 25, 1990, valued at approximately $17 million, including real property conveyed by properly recorded deeds, and (b) the February 2, 1989 deed of gift of personal property related to the Moltan Company. App. 13a-14a. The court first noted that under section 541(a) of the Bankruptcy Code, a debtor's legal and equitable interests in property are property of the estate at the commencement of the bankruptcy case. *Id.* at 36a. The court then noted that "[a]n equitable owner is one who is recognized in equity as the owner of property, because real and beneficial use and title belong to him, even though bare legal title is invested in another." *Id.* at 37a (citing *Black's Law Dictionary* 539 (6th ed. 1990)). According to the court, "Florida law recognizes that true ownership or an ownership interest may rest with a party who is not the titleholder of record." *Id.* From this, the court concluded, the Debtor had an equitable interest in the property he had transferred to Betty Gurley, because he had a close family relationship with her, because he exercised continued control and dominance over the assets, and because he fully managed all of the property and assets. *Id.* Thus, the court held that "[a]ll property transferred by the Debtor to his wife is property of the estate pursuant to 11 U.S.C. § 541(a)(1)." *Id.* at 38a.[3]

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[3] In the alternative, as to the Moltan gift, the Bankruptcy Court also found that William Gurley's deed of gift to Betty Gurley was not effective, because he did not deliver the deed to her or have a donative intent. App. 29a.

3. Betty Gurley appealed to the district court from the portion of this order "includ[ing] in the bankruptcy estate approximately $17 million in assets that Mrs. Gurley claims were effectively transferred to her by William Gurley" prior to April 25, 1990. App. 4a. The district court first found that, under Florida law, William Gurley retained "equitable ownership" of the transferred assets. *Id.* at 8a-9a. The court then rejected Betty Gurley's argument that the FDCPA's statute of limitations nonetheless applied to the transfers that occurred before April 25, 1990. The court maintained that "Mr. Gurley retained an equitable ownership in the assets, and that interest was never transferred." *Id.* at 9a. In other words, the court refused to treat Florida's concept of "retained equitable ownership" as simply another way of stating the legal conclusion that a particular transfer was fraudulent and could therefore be avoided. Finally, the court held that "[a]lthough Mr. Gurley may have executed a deed [of gift of the Moltan property] and Mrs. Gurley testified she knew of the gift, this evidence is overshadowed by evidence that Mr. Gurley continued to exercise control over Moltan Co." *Id.* at 11a.

4. The Eleventh Circuit affirmed. It first agreed with the lower courts' conclusion that "[t]he concept of equitable ownership has long been recognized by the Florida courts." App. 2a. It then stated that the although the Debtor "precipitously undertook to transfer certain assets and real property to his wife, the appellant, and to purchase other assets in her name," he remained the equitable owner of this property because he "continued to exercise dominion and control over [and to benefit from] the property and assets now held in [Betty Gurley's] name, including certain assets he purportedly had made as a gift to her." *Id.* at 3a. As a result, according to the court, the transferred property was the property of the bankruptcy estate from its inception and was not subject to the six-year statute of limitations applicable to the trustee's filing of claims against fraudulent transfers. See

id. ("[t]he statute of limitations applies where a party is seeking to set aside fraudulent transfers not, as here, where there was no valid transfer in the first place").

REASONS FOR GRANTING THE PETITION

The Bankruptcy Code defines the "property" of the bankruptcy estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Although "[p]roperty interests are created and defined by state law," *Butner* v. *United States*, 440 U.S. 48, 55 (1979), *federal law* – the Bankruptcy Code – defines what is property of the bankruptcy estate. 11 U.S.C. § 541(a). See *Charles R. Hall Motors, Inc.* v. *Lewis* (*In re Lewis*), 137 F.3d 1280 (3d Cir. 1998); *XL/Datacomp* v. *Wilson* (*In re Omegas Group, Inc.*), 16 F.3d 1443 (6th Cir. 1994); *Crysen/Montenay Energy Co.* v. *Esselen Assocs.* (*In re Crysen/Montenay Energy Co.*), 902 F.2d 1098 (2d Cir. 1990); *Koch Ref.* v. *Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339 (7th Cir. 1987).

In this case, the court of appeals held that under Florida law, a debtor retains an "equitable interest[]" in property fraudulently transferred to another, and that such property is property of the bankruptcy estate "as of the commencement of the case" under federal law. 11 U.S.C. § 541(a)(1). By this sleight of hand – defining a debtor's interest in fraudulently transferred property as an "equitable interest[]" in property and thus property of the bankruptcy estate at its inception – the court of appeals entirely eliminated any statute of limitations on claims of fraudulent transfer. Here, the transfers at issue occurred in 1989 and 1990, and the debt at issue was reduced to judgment in 1992; yet the action to set aside the transfer was not commenced until April of 1996. On the court of appeals' theory, however, a trustee may claim transferred property for a bankruptcy estate at any time, and the inconvenience of compliance with the already generous

federal limitations periods is avoided simply by defining the transfers away.

There is a conflict among the courts of appeals, however, concerning whether the Bankruptcy Code even *allows* fraudulently transferred property to be included in a bankruptcy estate at its inception. Compare *FDIC* v. *Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125, 131 (2d Cir. 1992) (fraudulently transferred property is *not* in the estate at its inception), with *Am. Nat'l Bank* v. *MortgageAmerica Corp.* (*In re MortgageAmerica Corp.*), 714 F.2d 1266, 1275 (5th Cir. 1983) (a debtor "continu[es] to have a 'legal or equitable interest[]' in the property fraudulently transferred within the meaning of § 541(a)(1) of the Bankruptcy Code"). The better interpretation is the *Colonial Realty Co.* interpretation – that fraudulently transferred property may *not* be treated as property of the bankruptcy estate. The Code specifies that such property *becomes* property of the estate only after the trustee "recovers" it, and that the trustee's right to recovery is subject to the limitations periods governing the claims of creditors. See 11 U.S.C. § 541(a)(3) (including in the estate "[a]ny interest in property *that the trustee recovers*" under specified sections authorizing the voiding of fraudulent transfers) (emphasis supplied)); *id.* § 544(b) (incorporating the applicable limitations period). The *MortgageAmerica Corp.* interpretation – that a debtor may have an equitable interest in fraudulently transferred property such that it is property of the estate at its inception – impermissibly writes these provisions (§§ 541(a)(3) and 544) out of the Bankruptcy Code.

The Eleventh Circuit wrongly joined the *MortgageAmerica Corp.* camp in this case. It first held that Florida defines an "equitable interest[]" in property to encompass property fraudulently transferred and then *included* such property in the bankruptcy estate at its inception under federal law. By doing so, the court of appeals impermissibly allowed state law to trump the federal law's definition of the bankruptcy estate

at "the commencement of the case" as excluding fraudulently transferred property. 11 U.S.C. § 541(a), (c). A state may not circumvent federal law in this way, particularly since the consequence of doing so is the elimination of any limitations period for claims of fraudulent transfer. See *Butner*, 440 U.S. at 55 (state law defines property interests of the debtor "*[u]nless some federal interest requires a different result*") (emphasis supplied).

This question is both recurring and important. One of the initial and central questions in every bankruptcy is what is property of the bankruptcy estate, and many bankruptcy cases involve claims that the debtor has fraudulently transferred assets. If states may avoid the federal law excluding fraudulently transferred property from the estate at its inception and imposing limitations periods on its recovery by the simple mechanism of deciding that a debtor has equitable ownership of fraudulently transferred property, these provisions effectively become null and void. Congress' intent will be doubly thwarted, because state law will have displaced federal law in an area of primary and preemptive federal control and because litigation that Congress has deemed stale will occupy the federal bankruptcy courts. In addition, the continued conflict among the federal courts concerning whether fraudulently transferred property is property of the bankruptcy estate *ab initio* will create a fundamentally unfair lack of uniformity in federal bankruptcy law. See U.S. Const. art. I, § 8, cl. 4.

For these reasons, this Court should grant the petition.

A. The Decision Is Wrong And Broadens A Conflict Among The Courts Of Appeals.

"The nature and existence of the debtor's right to property is determined by looking at state law," but the question whether that property is included in the property of the bankruptcy estate is governed by federal law. *In re Lewis*, 137 F.3d at 1283. Where a state defines a "legal or equitable

interest . . . in property" in a way that conflicts with federal bankruptcy law's definition of the property of the estate "as of the commencement of the [bankruptcy] case," the latter prevails. See *Butner*, 440 U.S. at 55 (state law defines property "[u]nless federal law requires a different result"). Cf. *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546 (1994) ("where the 'meaning of the Bankruptcy Code's text is itself clear,' . . . its operation is unimpeded by contrary state law or practice").

In this case, the lower courts held that under Florida law, a debtor retains equitable ownership of fraudulently transferred property.[4] As the court of appeals stated, the Debtor

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[4] In the Florida cases relied on by the lower courts, the court determined whether it was appropriate to impose legal responsibilities on, or to grant legal rights to, an individual or entity that was not the legal titleholder of an asset; when it was appropriate to do so, that party was deemed the equitable owner of an asset for the particular legal purpose at issue. *See, e.g.*, *Leon County Educ. Facilities Auth.* v. *Hartsfield*, 698 So. 2d 526 (Fla. 1997) (holding that the educational authority owned the property being used for student activities for purposes of a tax exemption even though the property was leased to another entity that was conducting the activities); *Towerhouse Condominium, Inc.* v. *Millman*, 475 So. 2d 674 (Fla. 1985) (holding that condominium association members who provided the funds for the purchase of a parking lot were the equitable owners of the property, not the condominium association which held the legal title); *Metro. Dade County* v. *Bros. of Good Shephard, Inc.*, 714 So. 2d 573 (Fla. Dist. Ct. App. 1998) (holding that a charitable group was not the equitable owner of a property that it was leasing for purposes of obtaining a tax exemption for the property); *White* v. *Brosseau*, 566 So. 2d 832 (Fla. Dist. Ct. App. 1990) (holding that purchaser of land was the equitable owner even though the mortgage holder retained the legal title until all installment payments on the purchase were made); *Williams* v. *Dep't of Health & Rehab. Servs.*, 522 So. 2d 951, 954 (Fla. Dist. Ct. App. 1988) (holding that an individual who supplied the fund for a mobile home purchase was the equitable owner of the home for purposes of determining eligibility for federal benefits). Analogizing the instant case to these cases, the lower courts determined that it is appropriate to impose legal responsibilities on a debtor who has fraudulently transferred title to an asset to a close relative for inadequate consideration and maintained

"precipitously undertook to *transfer* certain assets and real property to his wife, . . . and to purchase other assets in her name." App. 3a (emphasis supplied). Yet, the court continued, because under Florida law the Debtor retained "equitable ownership" of such property, it is treated not as a fraudulent transfer but as if "there was *no valid transfer in the first place*." *Id.* (emphasis supplied). Based on that reasoning and employing that state law label of equitable ownership, the lower courts concluded that fraudulently transferred assets are not transferred assets after all; instead, they are the property of the bankruptcy estate "as of the commencement of the case." 11 U.S.C. § 541(a)(1). But the label of equitable ownership, like the label of constructive trust,[5] is simply an equitable device or remedy for the fraudulent transfer of property; it does not alter the fact that a fraudulent transfer has occurred[6] and most certainly should

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full possession and control over that asset. The court thus labeled the debtor the "equitable owner" of such fraudulently transferred assets.

[5] *See XL/Datacomp* v. *Wilson* (*In re Omegas Group, Inc.*), 16 F.3d 1443, 1451 (6th Cir. 1994) (holding that a constructive trust is a remedy following a judicial decision and therefore that "a creditor's claim of entitlement to a constructive trust is not an 'equitable interest' in the debtor's estate existing prepetition").

[6] It is well established under Florida law and generally that where, as here, a debtor has transferred title to a close relative for inadequate consideration while retaining possession and control, he has made a fraudulent transfer. *See* Fla. Stat. ch. 726.105(2) (stating that a debtor's transfer of title to a close relative for inadequate consideration while "retain[ing] possession or control of the property transferred" are badges of fraud); 24 Am. Jur. *Fraudulent Conveyances* § 14 (1939) ("[t]he facts which are recognized indicia of fraud are numerous, the most important being the insolvency or indebtedness of the transferrer, lack of consideration for the conveyance, *retention by the debtor of possession of the property*, relationship between the transferrer and the transferee, reservation of benefit to the transferrer, the pendency or threat of litigation, secrecy or concealment, and the transfer of the debtor's entire estate") (emphasis supplied) (footnotes omitted). Put differently, the conclusion that a debtor is an equitable owner of transferred property is

not eliminate the application of the relevant statute of limitations.

The court of appeals' holding – that a debtor has an equitable interest in fraudulently transferred property such that it is property of the estate at its commencement – is wrong. Whatever state law provides, federal law, in the form of section 541(a) of the Bankruptcy Code, *excludes* fraudulently transferred assets from the bankruptcy estate at its inception.

As noted above, property of the estate includes "all legal or equitable interests of the debtor in property as of commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). This broad language might have encompassed a debtor's equitable interest in property fraudulently transferred, but for subsection 541(a)(3), which provides that the property of the bankruptcy estate also includes "[a]ny interest in property that the trustee *recovers*" under specified Bankruptcy Code provisions, including sections 544 and 550. *Id.* § 541(a)(3) (emphasis supplied). The latter provisions authorize the trustee to *recover* transferred property for the benefit of the estate to the extent a transfer is avoided as fraudulent, and the necessary implication is that such property is *not* included in the estate at the commencement of the case. As the Second Circuit has explained:

> "If property that has been fraudulently transferred is included in the §541(a)(1) definition of property of the estate, then §541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent

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the legal equivalent of the conclusion that the debtor has fraudulently transferred that property. *Cf. Cleveland Trust Co.* v. *Foster*, 93 So. 2d 112, 114 (Fla. 1957) (finding fraudulent a transfer of real property without consideration where the debtor continued in full use and possession); *Grant* v. *Benjamin* (*In re Benjamin*), 210 B.R. 203 (Bankr. M.D. Fla. 1997) (holding that husband fraudulently transferred used car lot business because it was transferred to his spouse without consideration and he continued to work for and receive benefits from the business).

> transfer actions." Further, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered." [*In re Colonial Realty Co.*, 980 F.2d at 131 (citation omitted) (quoting *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)).]

Equally to the point, as courts have recognized, "[i]f [fraudulently transferred property] were [property of the estate at its commencement], the trustee could simply use a turnover action under 11 U.S.C. § 542, *and the two (2) year statute of limitations of § 546(a) for actions under §§ 544 and 548 could be avoided.*" *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989) (emphasis supplied). See also *Grossman* v. *Murray* (*In re Murray*), 214 B.R. 271, 278 (Bankr. D. Mass. 1997) ("find[ing] the reasoning of *MortgageAmerica* unconvincing" and describing *In re Saunders* as taking the "better approach"); *In re Lofton*, 246 B.R. 604, 605 (Bankr. E.D. Ark. 2000) (same); *In re Allnutt*, 1995 WL 222067, at *4 (D. Md. Apr. 10, 1995) (same). Accordingly, federal law forbids the courts from labeling fraudulently transferred property as property of the estate at its inception, and a state may not circumvent this prohibition by defining a debtor's interest in fraudulently transferred property as an "equitable interest in property as of the commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). The court of appeals' contrary conclusion is plainly wrong.[7]

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[7] Certainly, the usual practice in bankruptcy law is to treat a debtor's prepetition transfers of title to an asset to a family member for inadequate consideration as fraudulent transfers, particularly if the debtor maintains possession and control of the asset. *See, e.g.*, *Taylor* v. *Rupp* (*In re Taylor*), 133 F.3d 1336, 1338 (10th Cir. 1998) (prepetition transfer of title of vehicle to spouse was fraudulent); *Salomon* v. *Kaiser* (*In re Kaiser*), 722 F.2d 1574, 1583 (2d Cir. 1983) ("[t]he transfer of property by the debtor to his spouse while insolvent, while retaining the use and

The decision deepens an acknowledged conflict in the federal courts. In holding that fraudulently transferred property is not part of the bankruptcy estate as of its commencement, the Second Circuit, in *In re Colonial Realty Co.*, 980 F.2d at 131, expressly rejected the contrary holding of the Fifth Circuit set forth in *In re MortgageAmerica Corp.*, 714 F.2d at 1275.

In that case, the Fifth Circuit held that a fraudulent transferor had an interest in the transferred property that is immediately part of the bankruptcy estate and can be reached by his creditors. *Id.* The court thought that

> [a]n action under the Fraudulent Transfers Act is essentially one for property that properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put it out of reach of creditors . . . . The transferee may have colorable title to the property, but the equitable interest – at least as far as the creditors (but not the debtor) are concerned – is considered to remain in the debtor so that the creditors may attach or execute judgment upon it as though the debtor had never transferred it. We think that *when such a debtor is forced into bankruptcy, it makes the most sense to consider the debtor as continuing to have a 'legal or equitable interest[]' in the property fraudulently transferred within the meaning of § 541(a)(1) of the Bankruptcy Code*. [*Id.* (emphasis supplied).]

See also *Cullen Ctr. Bank & Trust* v. *Hensley* (*Matter of Criswell*), 102 F.3d 1411, 1417 (5th Cir. 1997) ("what we recognized in *MortgageAmerica* is that when a soon-to-be-

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enjoyment of the property, is a classic badge of fraud"; "[h]e continued to retain the possession, benefit and use of the properties and treated them as his own"); *Beshears* v. *Schieffler* (*In re Beshears*), 182 B.R. 235, 239 (Bankr. E.D. Ark. 1995) (finding a fraudulent transfer where the "debtor transferred her largest asset . . . to close relatives near in time to the filing of her petition in bankruptcy" and "retained control over the property and treated it as her own").

bankrupt debtor . . . fraudulently transfers property to shield it from his creditors, that debtor/transferor should be considered to have retained an *equitable* interest in the property so that it will continue to be considered 'property of the estate'"); *S.I. Acquisition, Inc.* v. *Eastway Delivery Serv.* (*Matter of S.I. Acquisition, Inc.*), 817 F.2d 1142, 1150 (5th Cir. 1987); *In re Swallen's, Inc.*, 205 B.R. 879, 882 (Bankr. S.D. Ohio 1997); *McGowan* v. *Ciccone* (*In re Ciccone*), 171 B.R. 4, 5 n.2 (Bankr. D.R.I. 1994); *Cent. Heating & Air Conditioning, Inc.* v. *Famous Supply Co.* (*In re Cent. Heating & Air Conditioning, Inc.*), 64 B.R. 733, 736 (N.D. Ohio 1986). The Eleventh Circuit reached precisely the same conclusion in this case: It held that under Florida law, a debtor retains equitable ownership of fraudulently transferred property, and further determined that "it makes the most sense to consider the debtor as continuing to have a 'legal or equitable interest[]' in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code." *In re Mortgage-America Corp.*, 714 F.2d at 1275. This holding renders the limitations periods governing actions to avoid fraudulent transfers inapplicable.

In sum, by holding that Florida defines an "equitable interest[]" in property to encompass property fraudulently transferred and *including* such property in the bankruptcy estate at its inception, the court of appeals has embraced the erroneous *MortgageAmerica Corp.* interpretation of the Bankruptcy Code; elevated state law over the federal definition of the bankruptcy estate at "the commencement of the case" as excluding fraudulently transferred property (11 U.S.C. § 541(a)); rendered the statutes of limitations governing actions to avoid fraudulent transfers meaningless; and increased the mature conflict among the federal courts on this issue. The magnitude of the delay authorized here starkly illustrates the harmful effect of the decision below. The Court should grant the petition to resolve the conflict on this important question of federal bankruptcy law.

B. The Question Is Recurring And Important.

This question is both recurring and important. The first step, and one of the most critical steps, in every bankruptcy is determining the content of the bankruptcy estate. Numerous bankruptcy cases involve claims that the debtor has fraudulently transferred assets, and so the question whether a debtor has a property interest in such assets "as of the commencement of the [bankruptcy] case" (*id.* § 541(a)(1)) will often arise, as evinced by the cases addressing the issue cited above. The issue will most certainly and frequently recur in cases whether the applicable federal limitations period for avoiding fraudulent transfers has run, since, on the Eleventh Circuit's theory – and that of other courts sharing the *MortgageAmerica* approach – there may be no statute of limitations on such claims.

The resolution of the question is also critical to the maintenance of the proper federal role in bankruptcy law. Congress carefully delineated that federal role in bankruptcy proceedings, and, notably here, provided that federal law determines the content of the bankruptcy estate and the applicable limitations periods. Although Congress preserved the states' right to define property interests for the most part, it is clear that that right must give way to any conflicting provision in federal bankruptcy law. See, *e.g.*, *BFP*, 511 U.S. at 546; *Butner*, 440 U.S. at 55. But, if a state can define a debtor's "equitable interest[] in property" to include his or her interest in fraudulently transferred property, the state can easily do away with the federal provisions excluding fraudulently transferred property from the estate at its inception and imposing limitations periods on its recovery. Congress clearly did not contemplate this result – that a state could render federal law and limitations periods irrelevant with a word trick. And, Congress explicitly regarded certain litigation to recover fraudulently transferred property as "stale," and its intent should not be disregarded or circumvented, as has been done here. *Beach* v. *Ocwen Fed.*

Bank, 523 U.S. 410, 415 (1998) ("the object of a statute of limitations [is] keeping 'stale litigation out of the courts'"). Here a very lenient six-year limitations period has been rendered immaterial.

Finally, there is a strong federal interest in the uniform interpretation of important federal statutes, such as the Bankruptcy Code, and the need for a uniform rule on this oft-recurring question is unusually compelling. It is fundamentally unfair for debtors and creditors to be subject to different sets of *federal* rules based on nothing more than the fact that their bankruptcy cases are being litigated in different circuits. More specifically, there may be no statute of limitations on trustees or creditors seeking to avoid fraudulent transfers in the Eleventh and Fifth Circuits and certain other lower courts, while such claims are governed by the incorporated limitations periods in the Second Circuit and still other courts. Moreover, endless further litigation on this issue in bankruptcy proceedings is unquestionably a waste of limited resources, and only this Court can put an end to the dispute. Accordingly, this Court should grant review of this case and resolve the meaning of section 541(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 6, 2001

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13416

D.C. Docket No. 98-01169-CIV-ORL-18
95-00293A

IN RE: WILLIAM M. GURLEY,
Debtor.

BETTY JEAN GURLEY,
Plaintiff-Appellant,

versus

GEORGE E. MILLS, JR.,
Trustee, Chapter 7 Trustee,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(September 20, 2000)

Before TJOFLAT, WILSON and B. FLETCHER*, Circuit Judges.

PER CURIAM:

Betty Jean Gurley appeals the district court order affirming the bankruptcy court's decision that certain property held in her name is actually the equitable property of her husband,

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* Honorable Betty B. Fletcher, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

the debtor, and is therefore property of the bankruptcy estate. We affirm.

The concept of equitable ownership has long been recognized by the Florida courts. *See Leon County Educational Facilities Authority v. Hartsfield*, 698 So.2d 526, 528 (Fla. 1997) ("the concept of equitable ownership in ad valorem taxation has long been a part of Florida law"); *Towerhouse Condominium, Inc. v. Millman*, 475 So.2d 674, 677 (Fla. 1985) ("As a matter of law, where property is acquired in the name of one person or entity with consideration provided by others, the transferee is presumed to hold title on a resulting trust for those who provided the consideration."). The courts have recognized and enforced the principle of equitable ownership where, as here, bare legal title cannot be said to confer ownership. In *In re: Charnock*, 97 B.R. 619, 628 (Bankr. M.D. Fla. 1989), the bankruptcy court found that Mr. Charnock, not his wife, owned property held by a corporation of which Mrs. Charnock was the sole shareholder, finding that the "exercise of dominion and control of the assets and affairs of these entities and the total lack of involvement in the affairs by the president and sole stockholder Susan Charnock" were controlling factors. The court also found pertinent the "fact that when the entities were formed, the Debtor knew that he must shield his assets, otherwise they will be subjected to a tax claim of the Government." *Id.* In addition, the court pointed to the fact that the debtor "repeatedly and consistently held out to the public at large that the assets are in fact owned by him and he is in the sole control of these two entities." *Id.*; *see also LiButti v. United States*, 107 F.3d 110 (2d. Cir. 1997) (holding that a delinquent taxpayer was the equitable owner of assets even though his daughter held the title to those assets where the taxpayer controlled the assets, used the proceeds for his personal use, and daughter was uninvolved in the running of the business).

The facts of the case at hand lead us to conclude that the debtor maintained equitable ownership of all the assets and properties at issue here. The debtor was aware that a judgment against him (and not his wife) was imminent. He precipitously undertook to transfer certain assets and real property to his wife, the appellant, and to purchase other assets in her name. However, he continued to exercise dominion and control over all the property and assets now held in the appellant's name, including certain assets he purportedly had made as a gift to her. Moreover, he continued to benefit from the proceeds of all the properties and assets held in the appellant's name. Although the appellant signed her name to several documents, it was done at debtor's direction and did not evidence control of decision making on her part. Indeed, the debtor held himself out to the public as the owner of certain properties long after he had purportedly transferred them to the appellant.

The appellant's arguments that the instant action is barred by a statute of limitations is unavailing. The statute of limitations applies where a party is seeking to set aside fraudulent transfers not, as here, where there was no valid transfer in the first place.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed Aug. 9, 1999]

Case No. 98-1169-CIV-ORL-18A

IN RE: WILLIAM M. GURLEY,
Debtor.

BETTY JEAN GURLEY,
Appellant,

v.

GEORGE E. MILLS, JR.,
Appellee.

ORDER

Betty Jean Gurley appeals a final judgment entered by the United States Bankruptcy Court for the Middle District of Florida and challenges the bankruptcy court's decision to include in the bankruptcy estate approximately $17 million in assets that Mrs. Gurley claims were effectively transferred to her by William Gurley, who is Mrs. Gurley's husband and the debtor in this action. The bankruptcy court found that Mr. Gurley attempted to transfer the assets to his wife for the purpose of shielding those assets from a CERCLA judgment and that Mr. Gurley failed to do so effectively because he retained an equitable ownership interest in the assets. Mrs. Gurley argues that this finding was in error because (1) the limitations period governing fraudulent transfers had expired, (2) the equitable ownership theory relied upon by the court is inapplicable to this case, and (3) Mr. Gurley effectively

transferred the assets under the applicable state law. Because the issues raised on appeal turn on questions of fact and the bankruptcy court wholly discredited the testimony of Mr. and Mrs. Gurley, the bankruptcy court did not clearly err, and the bankruptcy court's entry of final judgment must be affirmed.

I. Background

In 1982, the Environmental Protection Agency (EPA) discovered spent sulphuric acid and clay residue during an inspection of a site located near Edmonson, Arkansas. The EPA determined that Mr. and Mrs. Gurley, among others, were responsible for dumping the hazardous substances. After Mr. Gurley refused to clean the property in accordance with the EPA's remediation plan, the United States filed a civil action on November 18, 1987 before the United States District Court in the Eastern District of Arkansas to recover past and future clean-up costs from Mr. and Mrs. Gurley and several others pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

In 1988, it appeared that the government's multimillion dollar lawsuit against Mr. Gurley would succeed and that the action against Mrs. Gurley would be dismissed. With the help of one of Mr. Gurley's employees, Bedford Heath, Jr., Mr. Gurley began attempting to transfer to Mrs. Gurley various assets including Moltan Co., a sole proprietorship organized and operated by Mr. Gurley. Over the period beginning December 1988 and ending December 1989, Mr. Gurley's assets dwindled from $15,730,342 to $1,791,370 while Mrs. Gurley's assets jumped from $7,005,700 to $24,369,568.

The United States ultimately dismissed Mrs. Gurley from the civil action in June 1990 and obtained a judgment against Mr. Gurley in 1992 for $1,786,503 plus any future costs which might be incurred for clean-up of the Edmonson site. *See U.S. v. Gurley Refining Co.*, 788 F. Supp. 1473 (E.D.

Ark. 1992), *aff'd in part and rev'd in part by U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), *cert. denied* 116 S.Ct. 73 (1995). The United States also initiated a second CERCLA action against Mr. Gurley in September 1993 to recover any past and future costs associated with the clean-up of a contaminated site located in West Memphis, Arkansas.

On July 26, 1995, Mr. Gurley filed a voluntary Chapter 7 petition for bankruptcy seeking a discharge of his debts. At that time, Mr. Gurley's assets totaled $258,459, and Mrs. Gurley's assets totaled approximately $23,305,307.

As part of the bankruptcy proceedings, the United States filed a proof of claim seeking approximately $25,000,000 in past and future clean-up costs for the Edmonson and West Memphis sites. Also, the United States brought Adversary Proceeding 95-293 objecting to Mr. Gurley's bankruptcy discharge. Furthermore, the bankruptcy trustee instituted Adversary Proceeding 96-159 seeking to recover certain allegedly fraudulent conveyances.

Following a final evidentiary hearing regarding the adversary proceedings, the bankruptcy court issued a memorandum opinion setting forth findings of fact and conclusions of law. In the memorandum opinion, the court wholly discredited Mr. and Mrs. Gurley's testimony and found that Mr. Gurley "transferred his assets with the actual intent to hinder, delay and defraud the United States." (August 15, 1997 Mem. Op. at 11, R. at 3.) The court stated that:

> The facts reveal a pattern of numerous omissions which certainly warrants the inference of reckless and cavalier disregard for the truth . . . The Debtor attempted to take advantage of a system available to benefit the honest, but unfortunate debtor. The Debtor's actions and attitude reflect disrespect and disregard for the Court.

(*Id.* at 14.) The court also found that, while the applicable statute of limitations prevented the United States from

recovering any property fraudulently transferred prior to April 1990, Mr. Gurley had not effectively transferred to his wife approximately $17 million worth of assets, including Moltan Co., because Mr. Gurley had retained control over, and thus an equitable ownership interest in, the assets. *(Id.* at 15, 16, 23-25.)

Based upon these findings, the court concluded that (1) the debtor's discharge was due to be denied, (2) the debtor's gift of Moltan Co. to Mrs. Gurley was ineffective, (3) the Trustee could recover any property fraudulently transferred prior to April 1990, and (4) the bankruptcy estate included the approximately $17 million worth of assets, including Moltan Co., that Mr. Gurley supposedly transferred to Mrs. Gurley. *(Id.* at 26.) On appeal, Mrs. Gurley challenges the bankruptcy court's conclusions that the gift of Moltan Co. was ineffective and that Mr. Gurley retained an equitable ownership interest in the assets that he supposedly transferred.

II. Discussion

A. Legal Standard

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. When reviewing a bankruptcy judge's judgment, order, or decree, a district court must give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses and must accept the bankruptcy court's findings of fact unless those findings are clearly erroneous. *See id.; Englander v. Mills (In re Englander),* 95 F.3d 1028, 1030 (11th Cir. 1996). In contrast, the district court need not defer to the bankruptcy court's conclusions of law and must review those conclusions de novo. *See In re Englander,* 95 F.3d at 1030.

B. Whether Mr. Gurley Retained an Equitable Ownership Interest in the Assets

The appellant first challenges the bankruptcy court's finding that Mr. Gurley retained an equitable ownership interest in the approximately $17 million worth of assets that he supposedly transferred to Mrs. Gurley. The appellant argues that the bankruptcy court's nominee theory of equitable ownership is not recognized in Florida and that it does not apply outside the context of tax collection cases. Further, the appellant contends that the statute of limitations regarding fraudulent transfers prevents the trustee from recovering any interest in the transferred property. In the alternative, the appellant asserts that the bankruptcy court failed to properly quantify any equitable ownership interests that Mr. Gurley retained. The court will address each of these arguments in turn.

The appellant first argues that the bankruptcy court improperly relied upon a nominee theory because Florida law does not recognize a nominee theory and because the nominee theory only applies in tax collection cases brought by the Internal Revenue Service. These arguments are unpersuasive. Florida law recognizes equitable ownership outside of the context of tax collection cases. *See, e.g., White v. Brousseau*, 566 So. 2d 832, 835-36 (Fla. Dist. Ct. App. 1990) (equitable title and equity or redemption recognized in quiet title action); *Williams v. Department of Health and Rehabilitative Servs.*, 522 So. 2d 951, 954 (Fla. Dist. Ct. App. 1988) (equitable ownership of a mobile home relevant to eligibility for public assistance); *Walton v. Tomax Corp.*, 632 So. 2d 178, 180, 181 n. 2 (Fla. Dist. Ct. App. 1994) (recognizing that a husband who ran the daily operation of a construction business and held the contractor's license could be personally liable for the corporation's contract liabilities even though his wife was the sole stockholder in the corporation). Moreover, the bankruptcy court's factual

findings clearly show that Mr. Gurley retained an equitable interest in the assets. In particular, the bankruptcy court found, as a matter of fact, that a close family relationship existed between Mr. and Mrs. Gurley, that Mr. Gurley retained complete control of all property supposedly transferred to Mrs. Gurley, that Mr. Gurley received no consideration for the value of the assets, and that Mr. Gurley continued to manage all of Mrs. Gurley's accounts, investments, and interests. (August 15, 1997 Mem. Op. at 24, R. at 3.) All of these findings support the conclusion that Mr. Gurley retained ownership of the assets. Because Florida law recognizes equitable ownership outside the context of tax collection cases and because the bankruptcy court's factual findings show that Mr. Gurley retained ownership of the assets, the bankruptcy court did not err in finding that Mr. Gurley retained an equitable ownership interest in the assets.

The appellant further argues that the bankruptcy court erred because Section 3307(b) of the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001-3308 ("FDCPA") extinguishes after six years the cause of action for avoidance of a transfer. This argument is also unpersuasive. The FDCPA's statute of limitations does not apply to the transfers because Mr. Gurley retained an equitable ownership interest in the assets and that interest was never transferred. By its own terms, Section 3307 only applies to actions where a plaintiff seeks to avoid a transfer, and Mr. Gurley had an ongoing, equitable interest in the assets that was never transferred.

The appellant argues in the alternative that, even if an equitable interest exists and the statute of limitations does not apply, the bankruptcy court failed to quantify Mr. Gurley's equitable interest because the court did not account for Mrs. Gurney's 49% equitable interest in the assets used by Moltan Co. and because the bankruptcy court did not define which assets constituted Moltan Co. Contrary to the appellant's

assertions, the bankruptcy court did quantify Mr. Gurley's equitable ownership interest. The court found that Mrs. Gurley did not have any equitable ownership interest in the Moltan Co. assets, and the court did not have to define which assets constituted Moltan Co. because nothing was ever transferred.

C. Whether Mr. Gurley Made an Effective Gift of Moltan Co.

The appellant also challenges the bankruptcy court's finding that Mr. Gurley did not make a valid gift of Moltan Co. to Mrs. Gurley. A donor makes a valid gift when (1) the donor intends to make a gift, (2) the donor actually or constructively delivers the gift to the donee, and (3) the donee accepts the gift. *See Fuller v. Fuller*, 215 So. 2d 507, 510 (Fla. Dist. Ct. App. 1968). The bankruptcy court found that Mr. Gurley neither intended to make a gift nor effectively delivered the gift to Mrs. Gurley. (August 15, 1997 Mem. Op. at 4-5, 15, R. at 3.)

The appellant argues that there is ample evidence to show that Mr. Gurley not only intended to make a gift but that he also delivered the gift. In support, the appellant directs this court's attention to the fact that Mr. Gurley prepared a deed to give Moltan Co. to Mrs. Gurley; that Mr. Heath, supposedly as Mrs. Gurley's agent, received the deed and put it in Mrs. Gurley's file in the office; that Mrs. Gurley testified that she knew of the gift even though she had not seen the deed; and that Mrs. Gurley filed permits, licenses, applications, business documents, and tax returns showing her as the sole owner of Moltan Co.

Although evidence may exist in the record to show that Mr. Gurley made a gift of Moltan Co. to Mrs. Gurley, this court's task is not to second-guess the bankruptcy court judge who had the opportunity to evaluate the credibility of the witnesses first hand. The issue of whether a valid gift was made is an issue of fact because, to determine whether a gift

was made, the bankruptcy court had to examine how Mr. Gurley, Mrs. Gurley, and Mr. Heath treated the supposed gift and, in doing so, had to weigh their credibility.

Substantial evidence supports the bankruptcy court's finding that Mr. Gurley did not effect a gift. Although Mr. Gurley may have executed a deed and Mrs. Gurley testified that she knew of the gift, this evidence is overshadowed by evidence that Mr. Gurley continued to exercise control over Moltan Co. by representing that he was the owner of Moltan Co., that Mrs. Gurley signed documents and checks when requested to without knowledge of the purpose and direction of the funds, and that the deed of gift was never in the possession of Mrs. Gurley but instead remained at Moltan Co. where Mr. Gurley could have access to it. Moreover, the bankruptcy court plainly discredited the testimony of Mr. and Mrs. Gurley as evidenced by the court's statement that "I can tell you very honestly, except for the last witness [James Gentry], your witnesses did not reach the credibility that I think you would have liked for the defendants, and that's almost to a person . . ." (May 16, 1997 Tr. at 87, R. at 21N.) Because there is substantial evidence to support the bankruptcy court's factual finding, the bankruptcy court did not clearly err when it found that Mr. Gurley did not make an effective gift of Moltan Co. to Mrs. Gurley.

III. Conclusion

Based upon the foregoing, the bankruptcy court's entry of final judgment is AFFIRMED. The court directs the clerk of court to close the case.

It is SO ORDERED in Orlando, Florida this 9th day of August 1999.

/s/ [illegible]
G. KENDALL SHARP
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed Sep. 16, 1997]

Case No. 95-03833-6B7
X-S-97-00085-N/A (N/A)

IN RE: WILLIAM M. GURLEY,
Debtor.

Adv. Case No. 95-00293

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM M. GURLEY,
Defendant.

Adv. Case No. 96-00159

GEORGE E. MILLS JR.,
CHAPTER 7 TRUSTEE,
Plaintiff,

v.

BETTY JEAN GURLEY,
Defendant.

AMENDED JUDGMENT

The United States of America's Complaint To Object To Or Revoke A Discharge Pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5), (a)(7), and (c) and George E. Mills Jr.'s, Chapter 7 Trustee, Complaint Seeking To Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), 550, Fla. Stat. Sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b),

having been tried before the Court, and in conformity with and pursuant to the MEMORANDUM OPINION entered on August 15, 1997, and the findings of fact and conclusions of law stated orally and recorded in open court on September 11, 1997, it is

ORDERED, ADJUDGED, and DECREED that judgment sought in the Plaintiff's, United States of America's Complaint to Object To Or Revoke A Discharge is entered in favor of Plaintiff, the United States of America and against Defendant/Debtor, William M. Gurley pursuant to 11 U.S.C. § 727(a)(4); it is further

ORDERED, ADJUDGED, and DECREED that the Defendant's/Debtor's, William M. Gurley, discharge is DENIED pursuant to 11 U.S.C. § 727(a)(4); it is further

ORDERED, ADJUDGED, and DECREE [sic] that judgment sought in Plaintiff's, George E. Mills Jr., Chapter 7 trustee, Complaint Seeking To Recover Property of the Estate is entered in part in favor of Plaintiff, George E. Mills Jr., Chapter 7 Trustee, and in part against Defendant, Betty Jean Gurley with respect to property fraudulently transferred as set out in the Memorandum Opinion and the findings of fact and conclusions of law stated orally and recorded in open court on September 11, 1997, pursuant to 11 U.S.C. § 544(b) and Fla. Stat. Sec. 726.l05(l)(a), and 28 U.S.C. § 3304 (a)(1) and § 3304(b)(1)(A) ; and it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiff, George E. Mills, Jr., Chapter 7 Trustee, may recover any and all property transferred by the Defendant/Debtor, William M. Gurley, to his wife, Betty Jean Gurley, pursuant to 11 U.S.C. § 544(b) and 11 U.S.C. § 54l(a)(l), including the following property and its proceeds:

1. Coastal Unilube non-compete payments totaling $2,300,000.00 (consisting of an initial payment of $1,020,000.00 plus periodic payments thereafter totaling $1,280,000.00);

2. Moltan Co.;

3. $2,099,143.00 in commercial paper held at Union Planters Bank;

4. $1,550,000.00 held at First Tennessee National Bank;

5. $7,500.00 from Memphis stockyard payments;

6. The survivorship interest of William Martin Gurley a/k/a W. M. Gurley in the real property located in Hardeman and Shelby Counties, State of Tennessee, as described in P.Ex. #57-83 attached;

7. Condominium located in Lake County, Florida;

8. $389,235.00 held at Union Planters National Bank;

9. $63,626.00 in proceeds from the Mulvaney Note;

10. $27,450.00 in proceeds from sale of real property located at lot 1, Gurley Subdivision, Desoto County, State of Mississippi;

11. Nevada real property located at Mount Diablo Meridian, Nevada, Township 23 N., Range 27 E., sections 28, 32 (lots 8, 11, 12), and 33 as more specifically described in P.Ex. #47-52 attached;

12. Tennessee real property located in Hardeman County and Nevada real property located in Churchill County related to the Moltan Company as more specifically described in P.Ex. #45-46, 53-56, 117 attached; and

13. $4,633,333.00 from the proceeds from the sale to Coastal Unilube.

Dated this 16th day of September, 1997.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed Aug. 15, 1997]

Case No. 95-03833-6B7

IN RE: WILLIAM M. GURLEY,

Debtor.

Adv. Case No. 95-00293

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM M. GURLEY,

Defendant.

Adv. Case No. 96-00159

GEORGE E. MILLS JR.,
CHAPTER 7 TRUSTEE,

Plaintiff,

v.

BETTY JEAN GURLEY,

Defendant.

MEMORANDUM OPINION

At Orlando, in said District on May 7-9, 12-16, and June 12, 1997, before Arthur B. Briskman, Bankruptcy Judge.

This matter came before the Court on Final Evidentiary Hearing on the Plaintiffs', United States of America, Complaint To Object To Or Revoke A Discharge Pursuant to

11 U.S.C. § 727 (a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5), (a)(7), and (c) and George E. Mills Jr., Chapter 7 Trustee, Complaint Seeking To Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b). Appearing before the Court were Robert L. Young, counsel for the Debtor, William M. Gurley; Richard M. Gladstein, counsel for the United States of America; James E. Foster, counsel for George E. Mills Jr., Chapter 7 Trustee; and Michael Williamson, counsel for Betty Jean Gurley. After reviewing the pleadings, exhibits, evidence, receiving live testimony from William M. Gurley, Betty Jean Gurley, Robert Harris, Cathy Toller, Jim D. Dorris, Dr. Mitchell Albert, Keith Papke, George E. Mills, Jr., David Weeks, Robert Pflueger, Ed Tillman, Bill Kimmel, Bedford Forest Heath, Ray Rotella, Dr. Charles Brandon, and Jim Gentry, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor, William M. Gurley, formed Gurley Refining Company ("GRC Co."), a partnership, with his wife and son to refine used oils. The Debtor and Betty Jean Gurley ("Mrs. Gurley") formed Gurley Refining Corporation ("GRC Corp.") in 1963 which accepted waste oil from GRC Co. and reprocessed it into usable oils. GRC Co. and GRC Corp. dumped spent sulfuric acid and clay residue from a refining process into a pit one eighth of a mile upgradient in Edmonson, Arkansas ("Edmonson site") in Spring 1979. The Environmental Protection Agency ("EPA") conducted site inspections beginning in 1982 and detected the hazardous substances. The EPA determined that the Debtor, along with others, was responsible for the disposal of hazardous wastes at the Edmonson site. The Debtor refused to clean the Edmonson site in accordance with the EPA plan of remediation pursuant to the Comprehensive Environmental

Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

The EPA brought a civil action, concerning the Edmonson site, in the United States District Court, Eastern District of Arkansas ("District Court") against the Debtor and others, including Mrs. Gurley, Larry Gurley, GRC Co., and GRC Corp. on November 18, 1987 to recover costs incurred and to be incurred in the clean-up. The EPA dismissed Mrs. Gurley as a defendant in June 1990.

The United States of America ("United States"), as part of pre-trial discovery, filed interrogatories, requests for production, motions to compel and conducted a deposition with the Debtor, seeking information regarding the Debtor's and his companies' liability and financial ability. The Debtor refused to provide the United States with personal financial information.

According to financial records, the Debtor's assets totaled approximately $15,730,342.00 and Mrs. Gurley's assets totaled approximately $7,005,700.00 in December 1988.

GRC Co. was sold to Coastal Unilube, Inc. ("Coastal") for $13,900,000.00, plus $2,300,00.00 [sic] in the form of a consulting agreement and a covenant not to compete in 1988. A portion of the sum was to be paid in installments. $4,600,000.00 was deposited in the Debtor's and Mrs. Gurley's joint account at Union Planters Bank ("Union") and later into Mrs. Gurley's account at Union in 1990. The Debtor maintains access to and control over these funds.

Bedford Forest Heath ("Mr. Heath") is a trusted employee of the Debtor's who has worked for him for many years. Mr. Heath assisted the Debtor in effecting monetary and property transfers to Mrs. Gurley. Mr. Heath acts at the Debtor's direction and continues to aid him in access and control of the assets transferred. The Debtor instructed Mr. Heath to deposit future installment payments, through 1993, totalling

$1,280,000.00, into Mrs. Gurley's account at Union. The Debtor has an equitable interest in these monies transferred to Mrs. Gurley.

The Debtor purported to transfer Moltan Co. to Mrs. Gurley by deed of gift on February 2, 1989. The Debtor formed Moltan Co. ("Moltan") in the 1980's doing business as a sole-proprietorship in Tennessee and Nevada to continue a business previously known as Maltan, Inc. Moltan manufactures diatomaceotis earth, an oil absorbent material used in cat litter and other products. The Debtor drew up and signed a deed of gift on February 2, 1989. It was given to Mr. Heath, and at the direction of the Debtor was placed in a filing cabinet located at Moltan. The Debtor did not tell Mrs. Gurley about the deed of gift. No other documents were ever executed to reflect Mrs. Gurley as the new owner. The Nevada and Tennessee employment and revenue agencies were not notified of Mrs. Gurley's status as "owner" of Moltan until April 1990. The Internal Revenue Service ("IRS") was initially notified in March 1991.

The gift of Moltan was not validly effected. The gift of deed was never delivered to Mrs. Gurley. The gift of Moltan never came within the power and control of Mrs. Gurley. Also, there was no true donative intent by the Debtor to divest himself of all dominion and control over Moltan. The Debtor continues to control Moltan and intended to from the time of execution of the alleged gift. The gift of deed has no effect. Moltan is property of the Debtor's, and is therefore, property of the estate.

Even if the deed of gift was effective, the Debtor has an equitable interest in Moltan, causing it to be property of the estate. The Debtor continues to own and run Moltan. All agents and employees of Moltan receive instruction from and look to the Debtor as boss. The Debtor takes no compensation from Moltan. Minutes taken from Moltan management meetings notice his presence and absence. The minutes do

not reflect Mrs. Gurley's absence or presence. He continued for years to represent to the Governors of Nevada and others that he was the owner of Moltan. He is continuously involved in the manufacturing, pricing, and shipping of products and the acquisition of assets at Moltan. The Debtor is the only authorized signatory on the Moltan Mastercard which he has used for both business and personal expenses between January 1990 and November 1995. Mrs. Gurley has no input in the management and control of Moltan. She signs Moltan checks, but has no knowledge as to the purpose or direction of such funds. The Debtor is the true owner of Moltan and all of its assets, real and personal.

The Debtor transferred $2,999,143.00 in commercial paper in a Tax Free Trust account at Union to Mrs. Gurley's account at Union in 1989. The Debtor effected this transfer through the aid of Mr. Heath. The Debtor has access to these funds through Mr. Heath, and therefore, maintains an equitable interest in these funds. The Debtor transferred $1,550,00.00 [sic] from the Debtor's and Mrs. Gurley's joint account at First Tennessee Bank ("First Tennessee") to an individual account of Mrs. Gurley's in 1989. The Debtor transferred $7,500.00 from Memphis stockyard payments to Mrs. Gurley between December 1989 and January 1990. The Debtor transferred his interest in numerous tracts of real property located in the 4th and 5th Civil District of Hardeman County, State of Tennessee to Mrs. Gurley on July 7, 1989 and August 9, 1989, respectively. (See P.Ex. #57-83).

Deposits of approximately $2,000,000.00 were made into the Debtor's and Mrs. Gurley's joint account at SunTrust Bank ("SunTrust") between July 1989 and April 1992. Funds from this account were used to purchase a condominium in Mrs. Gurley's name in [sic] located in Lake County, Florida in 1989. Deposits of approximately $2,200,000.00 were made into the Debtor's and Mrs. Gurley's joint account at Union Planters National Bank ("Union"), in addition to the funds

from the sale of GRC Co. to Coastal. The Debtor withdrew $389,235.00 from their joint account at Union and deposited the funds into Mrs. Gurley's account at Union. These funds originated from a joint federal income tax refund payable to the Debtor and Mrs. Gurley.

Financial records reflect that the Debtor's assets totaled approximately $1,791,370.00 and Mrs. Gurley's assets totaled approximately $24,369,568.00 in December 1989.

The United State's attorney, Craig Johnson ("Mr. Johnson"), at the conclusion of the Edmonson site trial, on September 13, 1990, raised concerns regarding the sale and rumored transfers from the Debtor to his wife, Mrs. Gurley. The District Court instructed Mr. Johnson to file a Motion and Affidavit in support of the allegations that there were conveyances of property which needed to be set aside. The District Court refused to permit Mr. Johnson to conduct discovery on the issue at that time. Mr. Johnson did not file a Motion or Affidavit, stating that he had no direct evidence or knowledge of the fact that the Debtor had transferred the proceeds from the sale to Coastal to Mrs. Gurley.

The Debtor transferred $63,626.00, proceeds of the Mulvaney Promissory Note, to Mrs. Gurley on September 19, 1990. The Debtor transferred proceeds of the sale of property located at lot 1, Gurley Subdivision, Desoto County, State of Mississippi to Mrs. Gurley on December 6, 1990. (See P.Ex. #319-320).

The District Court entered judgment in favor of the United States of America on March 26, 1992, holding the Debtor, GRC Corp., GRC Co., and Larry Gurley jointly and severally liable for clean-up costs in the amount of $1,786,502.95. The District Court also entered a declaratory judgment in favor of the EPA for future costs to be incurred at the Edmonson site.

U.S. v. Gurley Refining Co., 788 F. Supp. 1473 (E.D. Ark. 1992).[1]

The Debtor transferred to Mrs. Gurley $59,714.00 of annuity payments he received from Great West Life Annuity and Insurance Company and interest payments on certificates of deposit from 1991 to 1994. The Debtor transferred Nevada real property located at Mount Diablo Meridian, Nevada, Township 23 N., Range 27 E, section 32, lots 8, 11, and 12 to Mrs. Gurley in December 1992. (See P.Ex. #47-52).

The United States, through the Financial Litigation Unit of the United States Attorney's Office of the Eastern District of Arkansas, sent demand letters to the Debtor and continued attempts to discover personal financial information from the Debtor, concerning the Edmonson site. These attempts were unsuccessful. The United States did not (1) take depositions in aid of execution, (2) obtain an issuance of a writ of execution, (3) review public property records, (4) review corporate records, or (5) issue subpoenas for banks and other record keepers. The United States failed to exercise reasonable due diligence in discovering the transfers to Mrs. Gurley. The Debtor refuses to pay the judgment, today totaling approximately twelve million dollars ($12,000,000.00).

The EPA discovered waste residues in West Memphis, Arkansas ("South 8th Street site") and held GRC Co., GRC Corp. and the Debtor responsible. The EPA initiated an action pursuant to § 104(e) of CERCLA against the Debtor in September 1993, seeking to require the Debtor to provide information as to his potential liability for the cost of

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[1] The Eight Circuit Court of Appeals affirmed the judgment of the District Court on December 28, 1994. *U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1994). The Debtor's petition for writ of certiorari was denied by the United States Supreme Court on October 2, 1995. *William M. Gurley v. U.S.*, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995).

remediation and his ability to pay those costs. This action was pursued independent of the Edmonson site case.

The United States, through a Remedial Project Manager, David Weeks ("Mr. Weeks"), investigated and sought to obtain personal financial information from the Debtor in accordance with § 104(e) of CERCLA, 42 U.S.C. § 9604(e). The Debtor evaded service and refused to reveal personal financial information with respect to the South 8th Street site case. At no time did the attorneys and investigators of the Edmonson and South 8th Street sites come into contact to combine investigative efforts or to exchange informational requests and responses. The EPA did not (1) review public records, (2) review corporate records, or (3) issue subpoenas for banks and other record keepers.

Financial records reflect that the Debtor's assets totaled approximately $258,459.00 and Mrs. Gurley's assets totaled approximately $23,305,307.00 in July 1995.

The Debtor filed for relief under Chapter 7 of the Bankruptcy Code on July 26, 1995. 11 U.S.C. § 101, *et seq.* The United States is listed in the Debtor's Schedule F as an unsecured, non-priority creditor with a claim in an "unknown" amount and "disputed." The United States initiated an adversary proceeding by filing a Complaint To Object To Or Revoke A Discharge Pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5), (a)(7), and (c) on October 24, 1995. The Chapter 7 Trustee, George E. Mills ("Trustee") initiated an adversary proceeding by filing a Complaint Seeking To Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b) on April 25, 1996. The United States filed a proof of claim in this bankruptcy case, asserting that the Debtor owes it approximately twenty-five million dollars ($25,000,000.00) in past and future clean-up costs at the Edmonson and South 8th Street sites.

The Debtor in his bankruptcy petition, Statement of Financial Affairs and schedules filed with the Court falsely listed that he had no assets with the exception of $800.00 of exempt property in his bankruptcy petition. He did not accurately reflect his liabilities and did not disclose the existence of the Edmonson site judgment. The Debtor signed all provisions, swearing under penalty of perjury, that he read the information contained in his petition, Statements of Financial Affairs and schedules. He failed to disclose the following information: (1) he had a certificate of deposit titled in his name which he transferred post-petition to Mrs. Gurley on November 3, 1995; (2) he received approximately $60,000.00 from Greatwest Life and Annuity Insurance Co. between 1992 and 1994; (3) he is a managing executive at Moltan; (4) he received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; (5) he was an officer/director in five corporations within the two years before he filed his petition; and (6) he used Jim Dorris as an accountant. The Debtor filed subsequent amendments to disclose that he had received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; he was an officer/director in five corporations within the two years before he filed his petition; and that he used Jim Dorris as an accountant.

The Debtor is a highly sophisticated businessperson. He met with his attorney in July 1995 to discuss his filing of a petition in bankruptcy. He was represented by competent counsel. He wanted to file immediately, time was of the essence. The Debtor provided his attorney with the information to complete the Chapter 7 petition, Statement of Financial Affairs and all other sworn Statements in support of his petition. He reviewed all sworn Statements with his attorney before they were filed with the Court. He did not question his attorney. He did not exercise due care in completing, reviewing and executing the documents.

The Debtor filed a petition in bankruptcy in order to obtain the protection of the Court. His omissions and carelessness demonstrate a blatant disregard for the objectives and provisions of the Bankruptcy Code. The Debtor attempted to take advantage of a system created to benefit him. The Debtor's actions and attitude reflected disrespect and disregard for the law. The Debtor's failure to disclose his past and present interests in property, cash and businesses was intentional, knowing, fraudulent and material when omitted from his sworn Statements filed with the Court. The Debtor made false oaths in connection with this case.

The Debtor testified at the § 341 meeting of the creditors in February 1989 that he had previously transferred all of his assets, including Moltan Company ("Moltan"), real estate, cash and securities to Mrs. Gurley by 1989. The Debtor's reasons for the transfer include estate planning and health concerns. The Debtor began to transfer his assets at a time when the United States' multimillion dollar suit against him in the Edmonson site case seemed to be succeeding and when it appeared that the case against Mrs. Gurley was going to be dismissed. The Debtor made all transfers to an insider. He retained complete control of all property transferred after the transfers occurred. The Debtor transferred substantially all of his assets. He received no consideration. He became insolvent as a direct result of the transfers. The Debtor transferred his assets with the actual intent to hinder, delay and defraud the United States.

Mrs. Gurley pays for all of the Debtor's living expenses. She has no knowledge of the numerous accounts, investments and interests in her name. Mrs. Gurley signs documents and checks when requested to without knowledge of the purpose and direction of such funds. The Debtor has use of credit cards in her name. Mr. Heath facilitated numerous transfers to Mrs. Gurley, at the Debtor's direction. The Debtor has access to the transferred assets through Mr. Heath. All banking

documents and instructions with respect to them refer to "per Forest", Mr. Heath. Through Mr. Heath, the Debtor continues to manage and control all accounts, investments and interests of Mrs. Gurley. The dominion and control he exerts makes him the true owner of all assets transferred to Mrs. Gurley. Additionally, a close family relationship exists between the Debtor and the titleholder of all of the disputed property, Mrs. Gurley. The Debtor held himself out to the public in general that he was the "owner" of Moltan. He is a significant force in its corporate decision making. Moltan lacked any involvement by Mrs. Gurley, she never interfered with the Debtor's use and control. The Debtor exercises complete control and total domination over all assets transferred to his wife.

The Debtor is the effective owner of all property transferred to his wife. The Debtor at all time exercises a de facto ownership as he exercises plenary control for his own benefit over all property and funds transferred. The Debtor received no consideration for any of the assets transferred. The Debtor became insolvent as a direct result of the transfers to Mrs. Gurley. All assets transferred to Mrs. Gurley are property of the Debtor; and therefore, property of the estate.

CONCLUSIONS OF LAW

I.

The first issue before the Court is whether the Debtor's discharge should be denied pursuant to 11 U.S.C. § 727(a)(4).

Section 727(a)(4) provides:

> (a) The court shall grant the debtor a discharge, unless—
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made false oath or account; . . .

11 U.S.C. § 727(a)(4). A discharge may be denied where the debtor makes deliberate omissions. A discharge can also be

denied where the debtor's omission is fraudulent and material. The subject matter of a false oath is " material" , and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. *Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616 (11th Cir. 1984); *Windmiller v. Evans* (*In re Evans*), 106 B.R. 722 (Bankr. M.D. Fla. 1989). It makes no difference that he does not intend to injure his creditors when he makes a false statement. The creditors are entitled to judge for themselves what will benefit and what will prejudice them. The debtor's veracity is essential to the successful administration of the Bankruptcy Code. *In re Chalik*, 748 F.2d 616 (11th Cir. 1984); *L.P. Govaert v. Southern National Bank of North Carolina* (*In re Caserta*), 182 B.R. 599 (Bankr. S.D. Fla. 1995). Omissions signed under penalty of perjury constitute false oath. *Phillips v. Nipper* (*In re Nipper*), 186 B.R. 284 (Bankr. M.D. Fla. 1995).

The Debtor signed all provisions, swearing under penalty of perjury, that he read the information contained in his petition, Statements of Financial Affairs, and schedules. He falsely listed that he had no assets with the exception of $800.00 of exempt property in his bankruptcy petition. He did not accurately reflect his liabilities and did not disclose the existence of the Edmonson site judgment. He failed to disclose the following information: (1) he had a certificates of deposit titled in his name which he transferred post-petition to Mrs. Gurley on November 3, 1995; (2) he received approximately $60,000.00 from Greatwest Life and Annuity Insurance Co. between 1992 and 1994; (3) he is a managing executive at Moltan; (4) he had received $700,000.00 in non-compete income from Coastal Unilube in 1992 and 1993; (5) he was an officer/director in five corporations within the two years before he filed his petition; and (6) he used Jim Dorris as an accountant. The Debtor filed subsequent amendments to disclose that he had received $700,000.00 in non-compete

income from Coastal Unilube in 1992 and 1993; he was an officer/director in five corporations within the two years before he filed his petition; and he used Jim Dorris as an accountant.

The Debtor is a highly sophisticated businessperson. The Debtor met with his attorney in July 1995 to discuss his filing of a petition in bankruptcy. He was represented by competent counsel. He wanted to file immediately, time was of the essence. The Debtor, alone, was the one who provided his attorney with the information to complete the Chapter 7 petition, Statement of Financial Affairs and all other sworn Statements in support of his petition. He did not exercise due care in executing the documents. He reviewed all sworn Statements with his attorney before they were filed with the Court. If he was uncertain as to any question he could question his attorney; he did not. He understood what inquiry was being made in the petition, Statement of Affairs and schedules. He had the ability to consult his attorney. The facts support the allegation that the Debtor made false oaths in connection with this case.

The facts reveal a pattern of numerous omissions which certainly warrants the inference of reckless and cavalier disregard for the truth. *In re Sausser*, 159 B.R. 352 (Bankr. M.D. Fla. 1993); *In re Evans*, 106 B.R. 722 (Bankr. M.D. Fla. 1989). The Debtor filed a petition in bankruptcy in order to obtain the protection of the Court. His omissions and carelessness display a blatant disregard for the provisions of the Bankruptcy Code. The Debtor attempted to take advantage of a system available to benefit the honest, but unfortunate debtor. The Debtor's actions and attitude reflect disrespect and disregard for the Court. The Debtor offered no plausible explanation at trial for his omissions. *In re Nipper*, 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995). The absent responses would have been material to discovering what, if any, assets the Debtor may have had. *In re Chalik*, 748 F.2d

616 (11th Cir. 1984). The Debtor's failure to disclose his past and presents [sic] interest in property, cash and businesses was intentional, knowing, fraudulent and material when omitted from his sworn Statements filed with the Court. The Debtor's discharge is due to be denied pursuant to 11 U.S.C. § 727(a)(4).

II.

The second issue is whether the Debtor's alleged gift of Moltan to Mrs. Gurley was effective under Florida law.[2]

The gift of Moltan was not validly effected. The essential elements of a gift between husband and wife are (1) delivery, actual or constructive; (2) donative intent of the donor to divest himself of all dominion and control; and (3) acceptance by the donee, which may be presumed. *Fuller v. Fuller*, 215 S.2d 507, 510 (Fla. Dist. Ct. App. 1968). Delivery is an essential element of any gift and this requirement is directly applicable to asserted gifts between spouses. *Jones v. Ferguson*, 150 Fla. 313, 7 So.2d 464 (1942); *Winner v. Winner*, 370 So.2d 845 (Fla. Dist. Ct. App. 1979). Delivery of a deed is essential to the passing of title to the property intended to be conveyed to the grantee and is indispensable between members of a family as between persons unrelated. *Janes v. Janes*, 15 Fla. 716, 15 So.2d 677 (Fla. 1943); *United States v. Viomar Co.*, 616 F.Supp. 24 (Fla. Dist. Ct. App. 1985).

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[2] The parties have not disputed the application of Florida law to this case. The same result would be obtained under Tennessee law. An undelivered deed cannot effectively pass title from the grantor to the grantee. *Miller v. Morelock*, 185 Tenn. 466, 473, 206 S.W.2d 427, 430-31 (1948); *State of Tennessee v. Home Indemnity Company*, 442 S.W.2d 276 (Tenn. Ct. App. 1967). Additionally, the deed must be beyond the grantor's control. *Traders National Bank*, 142 Tenn. 229, 234, 217 SW. 977, 978 (1919); *Estate of Atkinson v. Allied Fence & Improvement Co.*, 746 S.W.2d 709, 711-12 (Tenn. Ct. App. 1987).

The facts fail to establish the existence of either actual or constructive delivery of the property at issue. All transfers by written instrument must pass beyond the dominion and control of the donor and come within the power and control of the donee. 38 Am.Jur.2d, Gifts, § 31. The alleged gift of deed was delivered by the Debtor to his trusted employee, Mr. Heath. The gift of deed was filed and remains filed at Moltan at the Debtor's direction and never came into Mrs. Gurley's possession. There was no evidence that the gift of Moltan came within the power and control of Mrs. Gurley. At the time of the alleged transfer, there was no evidence that there had even been a symbolic change in title or control of Moltan. Mrs. Gurley does not exert control at Moltan nor was she aware of the alleged gift for years after it was executed. Additionally, there was no true donative intent by the Debtor to divest himself of all dominion and control over the gifted property, Moltan. The Debtor continues to control Moltan and intended to from the time of execution of the alleged gift. The gift of deed has no effect, as a result Moltan is property of the Debtor and, is therefore, property of the estate pursuant to 11 U.S.C. § 541(a)(1).

III.

The third issue before the Court is whether the Chapter 7 trustee can recover a judgment pursuant to 11 U.S.C. § 544(b) for fraudulent transfers pursuant to Florida Statutes § 726.105 and /or 28 U.S.C. § 3304.

The trustee in bankruptcy "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . ." 11 U.S.C. § 544(b); *In re Davis*, 785 F.2d 926 (11th Cir. 1986). The trustee acting under § 544 represents the unsecured creditor, the United States. The general rule is that § 544(b) confers upon the trustee no greater rights of avoidance than the creditor would have to assert invalidity on his own behalf. If the creditor is barred from recovery

because of the running of a statute of limitations prior to the petition date, the trustee is likewise rendered impotent. *In re Kaufman & Roberts, Inc.*, 188 B.R. 309 (Bankr. S.D. 1995).

A transfer is fraudulent under Florida Statutes § 726.105, Florida Fraudulent Transfer Act ("FUFTA"), regarding transfers which are fraudulent as to present and future creditors if:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (A) With actual intent to hinder, delay, or defraud any creditor of the debtor; . . .

Fla. Stat. § 726.105 (1977). A cause of action with respect to a fraudulent transfer under § 726.105(1)(a) is extinguished, unless an action is brought within four years after the transfer was made, or if later, within one year after the transfer was or could have been reasonably been discovered by the claimant. Fla. Stat. § 726.110(1) (1997).

The trustee may only bring a claim to recover property transferred on or after April 25, 1992, four years before initiating the adversary proceeding on April 25, 1996. The United States with the exercise of reasonable due diligence could have reasonably discovered that the transfers to Mrs. Gurley occurred. The United States could have discovered the transfers in 1992 at the time the judgment was entered. Its sole reliance on the Debtor's refusal to respond to its requests for financial information was not reasonable. The United States had until March 1993 to bring a claim against the Debtor pursuant to Fla. Stat. § 726.105(1)(a). The trustee may only bring this claim under § 726.105(1)(a) to recover the property transferred on or after April 25, 1992.

The facts leave no doubt that the Debtor made transfers with actual intent to hinder, delay and defraud his creditor,

the United States.[3] The transfers were to Mrs. Gurley, an insider.[4] The Debtor retained complete control of all property transferred after the transfers occurred. A multimillion dollar suit had been filed against the Debtor prior to the time the transfers were made. The transfers made to Mrs. Gurley were of substantially all of the Debtor's assets. The Debtor received no consideration for the value of the assets he transferred to his wife. The Debtor became insolvent as a direct result of the transfers to his wife. The Debtor began to transfer significant assets to his wife before the United States obtained judgment against him and was completely insolvent after the United States obtained the judgment in March 1992.

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[3] (1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transfers the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Fla. Stat. § 726. 105(2).

[4] An "insider" includes:

1. a relative of the debtor . . .

Fla. Stat. § 726.102(7).

The trustee, standing in the shoes of the United States, may recover the following property fraudulently transferred by the Debtor on or after April 25, 1992 pursuant to Florida Statutes § 726.105(1)(a) and 11 U.S.C. § 544(b):

> (1) Coastal Unilube payments transferred to Mrs. Gurley on or after April 25, 1992,
>
> (2) Annuity payments transferred to Mrs. Gurley on or after April 25, 1992, and
>
> (3) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after April 25, 1992.

The Federal Debt Collection Procedures Act ("FDCPA") provides substantive federal fraudulent conveyance law for the United States. 28 U.S.C. §§ 3301-3308; *United States v. Moore*, 968 F.2d 1099, 1100 (11th Cir. 1992). The FDCPA arose to provide a single process by which the United States could collect debts owing to it, thereby circumventing the fifty distinct state debt collection procedures under which it had formerly been compelled to proceed. The United States may recover under both the FDCPA and FUFTA. *United States v. Maryans*, 1994 WL 681146 (N.D. Ind. 1994); *United States v. Carney*, 796 F.Supp. 700, 703 (E.D. N.Y. 1992). Section 3304 provides:

> (a) Debt arising before transfer-Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debtor to the United States which arises before the transfer is made or the obligation is incurred if-
>
> (1)(A) the debtor makes the transfer or incurs the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation; and
>
> (B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation; . . .

> (b) Transfers without regard to date of judgment-(1) Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the transfer or incurs the obligation—
> (A) with actual intent to hinder, delay, or defraud a creditor; or [sic]

28 U.S.C. § 3304.

The United States may, without regard to the date of judgment, bring a claim for relief under § 3304(b)(1)(A) within six years after the transfer was made or if later, within two years after the transfer was or could have been reasonably discovered. 28 U.S.C. § 3306(b). The United States may, when a debt arises before the transfer is made, bring a claim for relief under § 3304(a)(l) within six years after the transfer was made. 28 U.S.C. § 3306(b).

The debt for which the government through the trustee, seeks satisfaction arose in this case in March 1992 upon the entry of judgment against the Debtor. The statute of limitations applicable, without regard to the date of judgment, § 3304(b)(l)(A), provides that this claim for relief is extinguished unless it was brought six years after the transfer was made. This claim is timely only against property fraudulently transferred on or after April 25, 1990, six years before the adversary proceeding was filed in 1996. The United States could have reasonably discovered the transfers in 1992 through reasonable due diligence. The present action under § 3304(b)(1)(A) is timely only as to fraudulent transfers made on or after April 25, 1990.

The Debtors transfers of property and cash to Mrs. Gurley was made with actual intent to hinder, delay and defraud a

creditor, the United States.[5] The transfers were to Mrs. Gurley, an insider.[6] The Debtor retained complete control of all property transferred after the transfers occurred. A multimillion dollar suit had been filed against the Debtor prior to the time the transfers were made. The transfers made to Mrs. Gurley were of substantially all of the Debtor's assets. The Debtor received no consideration for the value of the assets he transferred to his wife. The Debtor became insolvent as a direct result of the transfers to his wife. The Debtor began to transfer significant assets to his wife before this United States obtained judgment against him and was

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[5] Actual intent may be determined by whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transfers the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

28 U.S.C. § 3304(b)(2); *In re Ford*, 25 F.3d 1039, 1994 WL 242156 (4th Cir. 1994).

[6] An "insider" includes:

1. a relative of the debtor . . .

Fla. Stat. § 726.102(7).

completely insolvent after the United States obtained the judgment in March 1992. The trustee may recover the following property fraudulently transferred by the Debtor on or after April 25, 1990 pursuant to 28 U.S.C. § 3304(b)(1)(A) and 11 U.S.C. § 544(b):

(1) Nevada real property transferred to Mrs. Gurley on April 8, 1992,

(2) Coastal Unilube payments transferred to Mrs. Gurley on or after April 25, 1990,

(3) Mulvaney note proceeds transferred to Mrs. Gurley on September 19, 1990,

(4) Annuity payments transferred to Mrs. Gurley on or after April 25, 1990,

(5) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after April 25, 1990, and

(6) Proceeds from the sale of Mississippi property transferred to Mrs. Gurley on December 6, 1990.

The statute of limitations applicable, when a debt arises before the transfer is made, § 3304(a)(1), provides that this claim must be brought by the United States six years after the transfer was made. 28 U.S.C. § 3306(b). The present action is timely filed as to fraudulent transfers made on or after March 26, 1992, when the debt obtained by the United States arose. 28 U.S.C. § 3302(3); *United States v. Gelb*, 783 F.Supp. 748, 755 (E.D. N.Y. 1991); *United States v. Lombardi*, 924 F.Supp. 361, 363 (D. R.I. 1996). The Debtor received less than reasonable equivalent value for the transfers made because he received no consideration. Further, the Debtor became insolvent as a result of the transfers.

The trustee, standing in the shoes of the United States, may recover the following property fraudulently transferred by the Debtor on or after March 26, 1992 pursuant to 28 U.S.C. § 3304(a)(1) and 11 U.S.C. § 544(b):

(1) Nevada real property transferred to Mrs. Gurley on April 8, 1992,

(2) Coastal Unilube payments transferred to Mrs. Gurley on or after March 26, 1992.

(3) Annuity payments transferred to Mrs. Gurley on or after March 26, 1992, and

(4) Any funds deposited by the Debtor into Mrs. Gurley's account at Union on or after March 26, 1992.

IV.

The fourth issue before the Court is whether the property transferred by the Debtor is property of the estate pursuant to 11 U.S.C. § 541(a)(1).

Section 541(a)(1) of the Bankruptcy Code provides, with certain exceptions, that all legal and equitable interests of a debtor in property as of the commencement of the case, wherever located or by whomever held, become property of the estate. 11 U.S.C.A. § 541(a)(1) (West 1993). The underlying theory of § 541(a)(1) is to bring into the estate all interests of the debtor in property as of the date the case is commenced. The term "property" must be construed generously. *United States v. Whiting Pools. Inc.*, 462 U.S. 198, 204-05, 103 S.Ct. 2309, 2313-14, 76 L.Ed.2d 515 (1983); *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S.Ct. 511, 514, 15 L.Ed.2d 428 (1966). The estate will include all legal or equitable interests of the debtor in property, both tangible and intangible. 5 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 541.04 (15th ed. 1997). Applicable state property law determines whether a debtor had a legal or equitable interest in property as of the Bankruptcy petition date. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *In re Health Products, Inc.*, 159 B.R. 332, 337 (M.D. Fla. 1993).

An equitable owner is one who is recognized in equity as the owner of property, because real and beneficial use and title belong to him, even though bare legal title is invested in another. BLACK'S LAW DICTIONARY 539 (6th ed. 1990); *Levin v. Carney*, 161 Ohio St. 513, 120 N.E.2d 92 (1954). The estate acquires the equitable interest of the debtor who holds an equitable interest in property without legal title.

At the time of the petition, the Debtor had an equitable interest in all of the property, real property, and cash transferred to Mrs. Gurley. Bare legal title is not determinative of all property rights; Florida law recognizes that true ownership or an ownership interest may rest with a party who is not the titleholder of record. *Towerhouse Condominium, Inc. v. Millman*, 475 So.2d 674 (Fla. 1985); *Simpson v. United States v. Woodard*, 1989 WL 732112 (M.D. Fla. 1989). An ultimate equitable owner "means a natural person who, directly or indirectly, owns or controls and [sic] ownership interest in a corporation, . . . regardless of whether such natural person owns or controls such ownership interest through one or other natural persons . . . ." Fla. Stat. §§ 607.0505 and 517.161 (1997).

A close family relationship exists between the Debtor and the titleholder of all of the disputed property, Mrs. Gurley. The Debtor exercises control and dominance over all assets transferred to his wife. Through his trusted employee, Mr. Heath, the Debtor has access to all assets transferred. With respect to Moltan, the Debtor repeatedly held himself out to the public in general that he was the "owner". Additionally, he is the dominant force in its corporate decision making, producing and pricing. Moltan lacked any involvement by Mrs. Gurley; she never interfered with the Debtor's use and control. Besides his control over Moltan, he continues to manage all accounts, investments and interests of Mrs. Gurley. Mr. Heath facilitated numerous transfers between the Debtor and Mrs. Gurley. As a trusted employee of the

Debtor's, he abets the Debtor in obtaining access to these assets. The Debtor is the effective owner of all property transferred to his wife and in an effort to secrete his ownership he made his wife his nominee. *Libutti v. United States*, 107 F.3d 110 (2nd Cir. 1997). The Debtor at all time exercises a de facto ownership as he exercises plenary control for his own benefit over all property and funds transferred. All property transferred by the Debtor to his wife is property of the estate pursuant to 11 U.S.C. § 541(a)(1).

V. Conclusion

The Debtor's discharge is due to be denied pursuant to 11 U.S.C. § 727(a)(4). The Debtor is a highly sophisticated businessperson who consulted a competent attorney in order to obtain protection in the bankruptcy court. The Debtor carelessly and deliberately omitted significant information from his petition, Statement of Financial Affairs and schedules filed with the Court. In addition, he [sic] actions and attitude display a blatant disregard for the law and this Court. The Debtor recklessly and cavalierly disregarded the truth.

The Debtor's purported deed of gift of Moltan to his wife was ineffective. There was no actual or constructive delivery nor did the Debtor have donative intent to divest himself of all the dominion and control of Moltan. Moltan is property of the estate pursuant to 11 U.S.C. § 541(a)(1).

Additionally, the Trustee may recover property fraudulently transferred by the Debtor with actual intent to hinder, delay, and defraud the United States as described by the Court pursuant to Fla. Stat. § 726.105, 28 U.S.C. § 3304, and 11 U.S.C. § 544(b).

Even if the Debtor's transfer of Moltan was effected by a valid deed of gift and even if the FUFTA and the FDCPA do not apply to the trustee's claim, all property transferred by the Debtor to Mrs. Gurley is property of the estate. The Debtor

maintains an equitable interest in all property transferred to Mrs. Gurley, including Moltan, cash and real property, pursuant to 11 U.S.C. § 541(a)(1). With respect to Moltan, the Debtor held himself out to the public and employees as the owner of Moltan. Mrs. Gurley does not exercise control at Moltan.

Additionally, the Debtor exercises control and dominance over all other assets transferred to Mrs. Gurley. Through his trusted employee, Mr. Heath, he has continuous access to the assets. This enables him to manage all accounts, investments and interests in Mrs. Gurley's name. The Debtor's transfers to his wife, Mrs. Gurley, were ineffective. The Debtor has an equitable interest in all property transferred to Mrs. Gurley. The assets are therefore, property of the estate pursuant to 11 U.S.C. § 541(a)(1).

Dated this 15th day of August, 1997.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed Aug. 15, 1997]

Case No. 95-03833-6B7

IN RE: WILLIAM M. GURLEY,
Debtor.

Adv. Case No. 95-00293

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM M. GURLEY,
Defendant.

Adv. Case No. 96-00159

GEORGE E. MILLS JR.,
CHAPTER 7 TRUSTEE,
Plaintiff,

v.

BETTY JEAN GURLEY,
Defendant.

JUDGMENT

The United States of America's Complaint To Object To Or Revoke A Discharge Pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(4)(A), (a)(4)(D), (a)(5), (a)(7), and (c) and George E. Mills Jr.'s, Chapter 7 Trustee, Complaint Seeking To Recover Property of the Estate Pursuant to 11 U.S.C. §§ 544(b), 550, Fla. Stat. sec. 726.105(1)(a) and (b), and 28 U.S.C. § 3304(a) and (b), having been tried before

the Court, and in conformity with and pursuant to the Memorandum Opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED, and DECREED that judgment sought in the Plaintiff's, United States of America's Complaint To Object To Or Revoke A Discharge is entered in favor of Plaintiff, the United States of America and against Defendant/Debtor, William M. Gurley pursuant to 11 U.S.C. § 727(a)(4); it is further

ORDERED, ADJUDGED, and DECREED that the Defendant's/Debtor's, William M. Gurley, discharge is DENIED pursuant to 11 U.S.C. § 727(a)(4); it is further

ORDERED, ADJUDGED, and DECREED that judgment sought in Plaintiffs, George E. Mills Jr., Chapter 7 Trustee, Complaint Seeking To Recover Property of the Estate is entered in part in favor of Plaintiff, George E. Mills Jr., Chapter 7 Trustee, and in part against Defendant, Betty Jean Gurley with respect to property fraudulently transferred as set out in the Memorandum Opinion pursuant to 11 U.S.C. § 544(b) and Fla. Stat. sec. 726.105(1)(a), and 28 U.S.C. § 3304(a)(1) and § 3304(b)(1)(A); and it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiff, George E. Mills Jr., Chapter 7 Trustee, may recover any and all property transferred by the Defendant/Debtor, William M. Gurley, to his wife, Betty Jean Gurley pursuant to 11 U.S.C. § 544(b) and 11 U.S.C. § 541(a)(1), including the following property:

1. Coastal Unilube payments totalling $1,280,000.00;
2. Moltan Co.;
3. $2,099,143.00 in commercial paper held at Union Planters Bank;
4. $1,550,000.00 held at First Tennessee National Bank;

5. $7,500.00 from Memphis stockyard payments;
6. Tennessee real property located in the 4th and 5th Civil District of Hardeman County, State of Tennessee (See Attached P.Ex. #57-83);
7. Condominium located in Lake County, Florida;
8. $389,235.00 held at Union Planters National Bank;
9. $63,626.00 in proceeds from the Mulvaney Note;
10. Proceeds from sale of real property located at lot 1, Gurley Subdivision, Desoto County, State of Mississippi (See Attached P.Ex. #319-320);
11. $59,714.00 in annuity payments from Great West Life Annuity and Insurance Company and interest payments on certificates of deposit; and
12. Nevada real property located at Mount Diablo Meridian, Nevada, Township 23 N., Range 27 E., section 32, lots 8, 11, and 12 (See Attached P.Ex. #47-52).

Dated this 15th day of August, 1997.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov. 7, 2000]

No. 99-13416-JJ

IN RE: WILLIAM M. GURLEY,

Debtor.

BETTY JEAN GURLEY,

Plaintiff-Appellant,

versus

GEORGE E. MILLS, JR.,
Trustee, Chapter 7 Trustee,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F. 2d_____).

Before: TJOFLAT, WILSON and FLETCHER*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

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* Honorable Betty B. Fletcher, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX G

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*; 42 U.S.C. 2751 *et seq.*), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout

agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2594; Pub.L. 98-353, Title III, §§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub.L. 101-508, Title III, § 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 102-486, Title XXX, § 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub.L. 103-394, Title II, §§ 208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129.)

11 U.S.C. § 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of

section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2596; Pub.L. 98-353, Title III, § 459, July 10, 1984, 98 Stat. 377; Pub.L. 105-183, §§ 3(b), June 19, 1998, 112 Stat. 518.)

Supreme Court, U.S.
FILED

MAR 29 2001

OFFICE OF THE CLERK

No. 00-1403

In The

Supreme Court of the United States

BETTY JEAN GURLEY,

Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether one who designates his wife as his nominee to hold bare legal title to his assets while retaining plenary control over and unfettered access to all of the assets has consummated a transfer which triggers the commencement of the limitations period for voiding a fraudulent transfer?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, George E. Mills, Jr., Chapter 7 Trustee, respectfully opposes the petition filed by Betty Jean Gurley seeking certiorari review of the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioner's lengthy exposition of the facts underlying the petition serves to underscore the obvious – the decisions below were fundamentally fact-driven. Equally as important, Petitioner's recitation of facts is not consistent with the findings below but rather reflects Mr. Gurley's testimony in the trial proceedings. The Bankruptcy Court made a seminal finding that Mr. Gurley lacked credibility.

> The facts reveal a pattern of numerous omissions which certainly warrants the inference of reckless and cavalier disregard for the truth. . . . The Debtor attempted to take advantage of a system available to benefit the honest, but unfortunate debtor. The Debtor's actions and attitude reflect disrespect and disregard for the Court.

App. D at 24a[1]. Although this finding formed the basis for denying Mr. Gurley's discharge in bankruptcy, it also stands as the trial court's evaluation of his credibility on

[1] All references are to the Appendix filed with the Petition for a Writ of Certiorari herein.

all the matters to which he testified. Thus, many of Petitioner's asserted "facts" that are derived from Mr. Gurley's testimony were specifically rejected by the Bankruptcy Court.

Petitioner states that the Bankruptcy Court found that the transfers at issue occurred *"prior to Betty Gurley's June 1990 dismissal from the CERCLA action* and after [William Gurley began] experiencing health problems." Petition at 2 (emphasis in the original). The Bankruptcy Court actually found that "[t]he Debtor began to transfer his assets at a time when the United States' multimillion dollar suit against him in the Edmonson site case seemed to be succeeding and when it appeared that the case against Mrs. Gurley was going to be dismissed." App. D at 24a. Moreover, the statement that the transfers occurred after Mr. Gurley experienced health problems is found in the trial court's recitation of Mr. Gurley's testimony. App. D at 24a. The Bankruptcy Court did not find that Mr. Gurley's transfers were truly health motivated[2].

Petitioner also states that "the courts have not acknowledged that William Gurley lost any right to sign checks or withdraw funds from accounts transferred to Betty Gurley in 1989." Petition at 3, n.1. In fact, the courts noted the insignificance of that "fact" by noting that all the assets were under the actual control of Forrest Bedford Heath, Mr. Gurley's trusted employee, through whom Mr. Gurley maintained complete access to and

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[2] In fact, the evidence at trial showed that Mr. Gurley first experienced the health problem to which he attributed his need for estate planning several months after the execution of the ineffective deed of gift of Moltan to Mrs. Gurley.

absolute control over all assets. App. B at 5a; App. D at 17a, 25a.

The Bankruptcy Court found that Mr. Gurley continued to exercise *de facto* control and dominion of all assets, regardless of how titled, and that, in contrast, Mrs. Gurley exhibited no indication of ownership of the assets. The Bankruptcy Court determined that in holding bare legal title to the assets, Mrs. Gurley was no more than Mr. Gurley's nominee as Mr. Gurley "exercises **plenary control** for his own benefit over all property and funds transferred." App. D at 36a-38a (emphasis added).

Moreover, the Bankruptcy Court found that Mr. Gurley had never made a gift of Moltan Company, the sole proprietorship he owned and operated, to Mrs. Gurley. App. D at 29a. This finding is purely one of fact and turns, in large part, on the Bankruptcy Court's evaluation of the credibility of the witnesses concerning that alleged gift. App. 18a-19a; 28a-29a.

Thus, the Bankruptcy Court found, as a mixed issue of fact and law, that no actual transfer of assets occurred. App. D at 37a-38a. Each reviewing court upheld that decision as supported by competent substantial evidence and by controlling law. App. A at 2a-3a; App. B at 8a-9a.

At every stage of this proceeding, Petitioner has contended that the statute of limitations for fraudulent transfers bars the Trustee's claim for turnover of Mr. Gurley's interest in these assets to his bankruptcy estate. The statute of limitations argument requires a finding of fact that a valid and effective transfer has been made. The Bankruptcy Court expressly rejected any such finding and that decision was upheld by both the United States

District Court and the Eleventh Circuit Court of Appeals. The Eleventh Circuit succinctly summed up the application of law to the facts of this case: "The statute of limitations applies where a party is seeking to set aside fraudulent transfers not, as here, where there was no valid transfer in the first place." App. A at 3a.

REASONS FOR DENYING THE PETITION

The ruling of the Bankruptcy Court, affirmed by the United States District Court and the Eleventh Circuit Court of Appeals, turned on issues of fact and the application of Florida law. *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979). App. 36a; 8a; 2a. As stated in Rule 10 of the Rules of the Supreme Court of the United States, *Considerations Governing Review on Certiorari*, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioner attempts to raise a question of federal law: whether fraudulently transferred assets are property of the estate at the commencement of the bankruptcy. Petition at 8. Having thus framed the issue, Petitioner contends that the decision of the Eleventh Circuit below "broadens a conflict among the courts of appeal." Petition at 9. The premise and the issue derived therefrom flagrantly misrepresent the decision of the Eleventh Circuit and raise issues not decided by any court below.

A. The Eleventh Circuit Ruled that No Effective Transfer Had Occurred; It Did Not Determine Whether Fraudulently Transferred Assets are Property of the Estate at the Inception of the Bankruptcy.

Petitioner contends that the Eleventh Circuit's decision in the case below aligns the circuit with those which hold that fraudulently transferred property is property of the estate before the trustee recovers it, citing *American National Bank v. Mortgage America Corp. (In re Mortgage America Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983). Petitioner urges this Court to reverse the Eleventh Circuit and to adopt the decision in *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992), as the controlling interpretation of 11 U.S.C. § 541. However, the Eleventh Circuit's decision below does not turn on this issue, and for good reason. The Petitioner did not raise it in any prior proceeding on this matter[3]. Not surprisingly, therefore, none of the courts addressed the issue in the analysis of the case. *See* App. A at 1a-3a; App. B at 4a-11a; App. D at 15a-39a.

The courts below never needed to address the issue, because on the facts before them, the issue never ripened. The trial court found, and each appellate court affirmed, that **no effective transfer had occurred**. Thus, the question of whether fraudulently transferred assets are part of

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[3] This alone is sufficient grounds to deny the petition for writ of certiorari. The Court will not ordinarily decide issues of law not raised in the lower tribunals. *See e.g. Glover v. United States*, ___ U.S. ___ 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); *Taylor v. Frieland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992).

the bankruptcy estate at its inception is not at issue on these facts.

The Eleventh Circuit's decision expressly turned on the facts of record:

> The debtor was aware that a judgment against him (and not his wife) was imminent. He precipitously undertook to transfer certain assets and real property to his wife, the appellant, and to purchase other assets in her name. **However, he continued to exercise dominion and control over all the property and assets now held in the appellant's name, including certain assets he purportedly had made as a gift to her. Moreover, he continued to benefit from the proceeds of all the properties and assets held in the appellant's name. Although the appellant signed her name to several documents, it was done at debtor's direction and did not evidence control of decision making on her part. Indeed, the debtor held himself out to the public as the owner of certain properties long after he had purportedly transferred them to the appellant.**

App. A at 3a (emphasis added). The Eleventh Circuit was not concerned in the least with whether **fraudulently transferred** assets were part of the estate prior to recovery by the trustee. Rather, the sole issue before the Eleventh Circuit (as it had been the sole issue before the District Court) was whether **any** effective transfer had **ever** taken place. The Circuit Court found on the factual record before it that, as a matter of Florida law, no transfer had occurred.

Petitioner contends that a state may not "circumvent this prohibition [against including fraudulently transferred property in the bankruptcy estate at its inception] by defining a debtor's interest in fraudulently transferred property as an "equitable interest in property . . . ."[4] Petitioner begs the question when she ignores the plain distinction the courts drew between "fraudulent transfer" and "no transfer." Where no transfer has occurred, there can be no fraudulent transfer.

Reality must control over manipulation of legal principles. While Petitioner persists in referring to the assets as fraudulently transferred, the courts below uniformly found that Mr. Gurley had divested himself of nothing but naked legal title. His wife did not hold anything in her own right or exercise any ownership interest or control. She was merely Mr. Gurley's nominee – his puppet – through whom he maintained precisely the same ownership authority and control he had always enjoyed in his assets. The courts below held that one who divests himself of **nothing**, one who merely changes the label on his property, brings all he has into the bankruptcy estate once he seeks the protection of bankruptcy laws. The reality before the Bankruptcy Court was that Mr. Gurley

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[4] State law attributing ownership to the party who exercises plenary authority and control over the asset is not, as Petitioner describes it, "sleight of hand." Petition at 7. Rather, the law serves to frustrate Mr. Gurley's own attempt at sleight of hand. The law will not permit him to make his assets disappear for purposes of bankruptcy while allowing him to retain his power and control over them for purposes of his own enjoyment, benefit, management and operation.

continued to exercise virtual and plenary ownership over all the assets he purported to have transferred to his wife.

The question this case actually presents (a question Petitioner does not want to raise because the issue has uniformly been decided against her) is whether her husband could use her as a pawn to protect his assets from bankruptcy while he retained complete, unfettered control over those same assets. The courts below have applied simple logic, equity, and the clear precepts of Florida law to reach the correct determination: One who retains the use, benefit, dominion and control over an asset is its "owner" regardless of the form in which legal title is held. *See Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985); *Metropolitan Dade County v. Brothers of Good Shepherd, Inc.*, 714 So. 2d 573 (Fla. 3d DCA 1998); *Leon County Educational Facilities Authority v. Hartsfield*, 698 So. 2d 526 (Fla. 1997); *Walton v. Tomax Corp.*, 632 So. 2d 178 (Fla. 5th DCA 1994); *Williams v. Department of Health and Rehabilitative Services*, 522 So. 2d 951 (Fla. 1st DCA 1988); *Bove v. PBW Stock Exchange, Inc.*, 382 So. 2d 450 (Fla. 2d DCA 1980).

Federal law also reaches this conclusion when specific findings of fact inexorably compel it. *See In re LiButti*, 107 F.3d 110 (2d Cir. 1997); *Towe Antique Ford Foundation v. IRS*, 999 F.2d 1387 (9th Cir. 1993); *In re Charnock (United States v. Charnock)*, 97 B.R. 619 (Bankr. M.D. Fla. 1989). In short, both federal and Florida courts refuse to be duped by appointment of a nominee into believing that the individual controlling the nominee has divested himself of ownership interest in the property.

As a matter of law, William Gurley's bankruptcy estate included whatever he owned, regardless of the "label" he had attached to it. Inasmuch as he had relinquished no ownership control or authority to his wife and had denied himself no benefit from or authority over the assets, the assets were rightly part of his estate when he fraudulently sought bankruptcy protection.

There is no conflict between or among the circuits on this issue.

B. The Question Presented by the Case Before the Court is Neither Important nor Recurring.

Petitioner contends that the question of whether fraudulently transferred assets are property of the bankruptcy estate at the commencement of the bankruptcy is an important and recurring issue. Respondent expresses no opinion on that contention because it is irrelevant to certiorari review of this case[5]. Rather, Respondent points out that the fact-specific determination that no effective transfer had occurred cannot be a recurring issue for purposes of a grant of certiorari review. Fact-specific cases, by their very nature, are not "bright-line" cases establishing general rules of law.

There is no conflict among the circuits over the issue which was dispositive in this case: Whether one who retains all ownership interest in his assets other than bare

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[5] Nonetheless, if Petitioner is correct, the conflict will certainly be raised before this Court in a case in which the issue was material to the holding below and passed upon by the appellate court. This is **not** that case.

legal title has "transferred" assets as contemplated in 28 U.S.C. § 3301. As noted above, federal courts have recognized that on specific facts, ownership does not follow legal title. Nominees are not owners.

The question Petitioner raises is not important to the resolution of this case. Even assuming this Court were to determine that Petitioner's interpretation of 11 U.S.C. § 541 is correct, the outcome of this case would not be altered because the controlling finding of fact herein was that no effective transfer had occurred.

CONCLUSION

WHEREFORE, Respondent George E. Mills, Jr., Chapter 7 Trustee, respectfully requests this honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 00-1403

IN THE

Supreme Court of the United States

BETTY JEAN GURLEY,

Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In his brief in opposition, Respondent does not contest that the question whether fraudulently transferred assets are property of the bankruptcy estate at its inception is important and recurring and further he acknowledges that the courts of appeals are in conflict on this issue. Opposition ("Opp.") at 9, 5. But Respondent contends that this case is not a good vehicle for the resolution of the question on several grounds. In this reply, we show that Respondent's arguments are entirely without merit, and that certiorari should be granted in this case.

1. Respondent's first argument is that the Court should not consider the legal question presented because the Petition rests on "'facts' that are derived from Mr. Gurley's testimony

which were specifically rejected by the Bankruptcy Court." Opp. at 1, 2. This is simply and clearly untrue.

For purposes of the petition for certiorari, Betty Gurley accepted the lower courts' factual findings that her husband had transferred the assets in question to her so that they would not be included in his estate and that he continued to exercise dominion and control over the assets. For example, in the Statement of the Case, Betty Gurley expressly acknowledged that the Bankruptcy Court rejected William Gurley's testimony that he transferred the assets in question for estate planning purposes and found instead that he sought to avoid a forthcoming civil judgment. See Petition at 3 ("[t]he court, however, found that William Gurley somehow knew 18 months in advance that Betty Gurley would be dismissed from the CERCLA action and that two years hence judgment would be entered against him such that he retained complete control of the property transferred after the transfers occurred and received no consideration. Accordingly, the court concluded that his intent in making the transfers was to hinder, delay and defraud the United States") (citation omitted; internal quotations omitted).[1] The Petition further accepted the lower courts' legal conclusion that Respondent was entitled to avoid any fraudulent transfers made on or after April 25, 1990 – *i.e.*, within the six-year limitations period for the filing of claims of fraudulent transfer. Petitioner's sole contention to this Court is the purely legal one that neither a State nor a court may define a debtor's interest in fraudulently transferred property as an equitable ownership interest and thereby entirely eliminate any statute of limitations on claims of fraudulent transfer for purposes of federal bankruptcy law. Put differently, federal law defines what is property of the bankruptcy estate; federal law excludes fraudulently

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[1] In addition, the Petition expressly recognized that, despite Betty Gurley's vehement opposition and evidence to the contrary, the lower courts found against her with respect to her claims of real and personal property rights. Petition at 3 n.1.

transferred property from the estate at its inception and sets limitations periods for claims seeking to include it; and state law may not circumvent these federal laws simply by defining the debtor's interest in fraudulently transferred property as an equitable interest.[2]

It is, accordingly, Respondent who is missing the point with his oft-repeated statement that Betty Gurley is ignoring the lower courts' conclusion that no effective transfer occurred. This is not a factual finding, but a legal conclusion. The lower courts attached the legal label of "equitable ownership" to the set of facts found by the Bankruptcy Court; by contrast, Betty Gurley asserts that the proper label for this set of facts under federal law is "fraudulent transfer." The lower courts' ruling contravenes federal law by including fraudulently transferred property in the estate at its inception and, more importantly, by eliminating any statute of limitations on fraudulent transfers. See, *e.g.*, *FDIC* v. *Hirsch* (*In re Colonial Realty Corp.*), 980 F.2d 125, 131 (2d Cir. 1992); Petition at 12-13 (citing cases). We are not ignoring the legal conclusion that no effective transfer occurred, but instead are challenging the legal label placed on the events in question and its undeniable ill effects.

2. Respondent's next argument is that, although there is a conflict on the question whether fraudulently transferred property is property of the estate before the trustee recovers it, this Court should not grant the petition and decide the issue because Betty Gurley failed to raise this question below. Opp. at 5. That argument is demonstrably wrong.

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[2] Respondent insinuates that this Court should not grant certiorari because the lower courts found Mr. Gurley not to be credible – *i.e.*, that an erroneous legal ruling should not be the subject of certiorari review because the petitioner's husband does not deserve the Court's attention. This is no part of the test for this Court's review; moreover, Betty Gurley, not her husband, is the petitioner here.

In her opening brief to the court of appeals, Betty Gurley specifically argued that "[t]he courts below erred in concluding that § 541(a)(1) [which defines the property of the estate at its inception to include equitable interests in property] contains a grant of authority to set aside transfers. This reading renders § 541(a)(3) superfluous. Section 541(a)(3) provides that property recovered by the Trustee under his avoidance powers is property of the estate. If § 541(a)(1) was meant to include a self-executing avoidance power to set aside transfers of property, the Congress would never have included subsection (a)(3)." Brief of the Appellant at 28, *Mills* v. *Gurley* (*In re Gurley*), No. 99-13416-J (11th Cir. Sept. 20, 2000); see also *id.* at 16-17. Even more to the point, Betty Gurley argued that "[t]he Trustee's denomination of his remedy as the nominee theory, alter ego theory, or constructive trust theory does not obviate the fact that *each of these is merely an equitable remedy for the recovery of wrongfully transferred property*." *Id.* at 32-33 (emphasis supplied). Indeed, the heading of the primary argument in Betty Gurley's Reply Brief in the court of appeals stated: "The courts below erred in setting aside transfers under 11 U.S.C. § 541 in as much as they crafted a novel equitable remedy to circumvent the extinguishment of the trustee's cause of action." Reply Brief of Appellant at 12, *Mills* v. *Gurley* (*In re Gurley*), No. 99-13415-J (11th Cir. Sept. 20, 2000) (capitalization omitted). Betty Gurley most certainly argued in the lower courts that the federal limitations period for fraudulent transfers may not be avoided by defining a debtor's interest in fraudulently transferred property as an "equitable interest[]" in property under section 541(a)(1) of the Bankruptcy Code, 11 U.S.C. § 541(a)(1).

3. Respondent's brief in opposition recites the "facts of record" that led the courts below to the conclusion that the debtor retained an "equitable interest[]" in the property transferred to his wife. Based on these facts, Respondent argues, the courts found that "no transfer had occurred."

Opp. at 6. But the facts of record plainly show that a fraudulent transfer has occurred under well established law. Indeed, prepetition transfers to family members of title to an asset for inadequate consideration are routinely treated as fraudulent transfers, especially where, as here, the debtor retains possession or control of the asset. See Petition at 13 & n.7 (citing and describing cases); *id.* at 11 n.6 (describing Florida law of fraudulent transfer). Yet the court of appeals found that under Florida law, the debtor had retained equitable ownership of the property transferred, and therefore concluded that under *federal* law, the property remained in the estate from its inception and that no federal limitations period applied. But the state law label of equitable ownership, like the labels of nominee, constructive trust, alter ego, are nothing more than equitable devices or remedies for dealing with the fraudulent transfer of property, see, *e.g.*, *XL Datacomp* v. *Wilson* (*In re Omegas Group, Inc.*), 16 F.3d 1443, 1451 (6th Cir. 1994) ("a creditor's claim of entitlement to a constructive trust is not an 'equitable interest' in the debtor's estate existing prepetition"); and such labels do not alter the fact that under federal law, a fraudulent transfer has occurred and a federal limitations period applies.

Respondent's citation of three federal cases holding that federal taxing authorities can seize assets from a taxpayer's nominee are entirely inapposite here. In all three cases – *LiButti* v. *United States*, 107 F.3d 110 (2d Cir. 1997); *Towe Antique Ford Foundation* v. *IRS*, 999 F.2d 1387 (9th Cir. 1993); *United States* v. *Charnock* (*In re Charnock*), 97 B.R. 619 (Bankr. M.D. Fla. 1989) – the courts held that a taxpayer and a business entity were alter egos or, put differently, that the business entity was the taxpayer's nominee, and therefore that the federal taxing authority was entitled to engage in reverse piecing of the corporate veil so that the assets of a corporate entity could be used to satisfy the debts of the individual taxpayer. None of these cases addressed the question whether a fraudulent transfer had occurred for

purposes of federal bankruptcy law and none involved the application of a statute of limitations for such a claim. These cases simply do not assist the inquiry into the question presented here – whether a state law label may circumvent the federal bankruptcy law's provisions excluding fraudulently transferred property from the bankruptcy estate at its inception and establishing limitations periods for claims for the return of such property.

4. Finally, Respondent contends that the real question presented by this case is "whether [Betty Gurley's] husband could use her as a pawn to protect his assets from bankruptcy while he retained complete, unfettered control over those same assets." Opp. at 8. This is an appeal to emotion that is worse than misleading, for it is untrue. The law is absolutely clear that if a debtor fraudulently transfers assets to protect them from bankruptcy while retaining possession and use, the trustee in bankruptcy may recover those assets for the bankruptcy estate at any time during a generous period of six years under the Federal Debt Collection Procedures Act. There is no question that a debtor seeking to avoid payment of debts by transferring assets is prohibited from doing so by the Bankruptcy Code. But it is equally clear that here, as the Bankruptcy Court found, "[t]he United States failed to exercise reasonable due diligence in discovering the transfers to Mrs. Gurley," Pet. App. 21a, and that the limitations period ran. Thus, the question presented is whether a state may define a debtor's "equitable interest[]" in property to include property fraudulently transferred such that the property is part of the bankruptcy estate "as of the commencement of the case" under federal bankruptcy law, 11 U.S.C. § 541(a)(1), and thereby avoid the application of any federal limitations period for claims of fraudulent transfer.

* * * *

The petition presents an important and recurring issue on which there is an acknowledged conflict among the federal courts. This case directly poses that issue in a context that is

outcome determinative and was preserved below. Accordingly, the Court should grant the petition and resolve the conflict among the circuits.

CONCLUSION

For the reasons stated herein and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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